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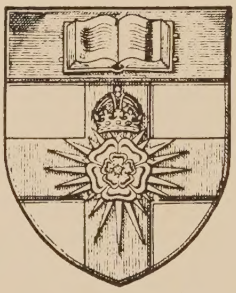

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CHANCERY DIVISION

AND IN

BANKRUPTCY AND LUNACY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

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VOL. XXIV.

1883.—XLVI. and XLVII. VICTORIÆ.

LONDON:
Printed and Published for the Council of Law Reporting
BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 27, FLEET STREET, E.C

1883.

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Page	*Line*	*For*	*Read*
195	9	no costs	costs given to applicant
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The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1883, will be as follows:—

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A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Adams and Kensington Vestry, *In re* – – – – – 199
Agar-Ellis, *In re*. Agar-Ellis *v.* Lascelles – – – – 317
——— *v.* Lascelles. *In re* Agar-Ellis – – – – 317
Allen, Boyd *v.* – – – 622
Andros, *In re*. Andros *v.* Andros 637
——— *v.* Andros. *In re* Andros 637
Arcedeckne, *In re*. Atkins *v.* Arcedeckne – – – 709
———, Atkins *v.* *In re* Arcedeckne – – – 709
Armitage, Smith *v.* – – 727
Arnal, *Ex parte*. *In re* Witton 26
Atkins *v.* Arcedeckne. *In re* Arcedeckne – – – 709

B.

Badische Anilin und Soda Fabrik *v.* Levinstein – – 156
Bagster, *Ex parte*. *In re* Bagster – – – – – 477
Beavan *v.* Beavan – – 649, n.
Beck, *In re*. *In re* Cartington Estate – – – – 608
Bell *v.* Sunderland Building Society – – – – – 618
Bellamy and Metropolitan Board of Works, *In re* – – – 387
Beloe, Sergenson *v.* *In re* Watmough – – – – 280
Birkbeck Freehold Land Society, *In re* – – – 119
Blackburn and District Benefit Building Society, *In re* – 421
Bonner *v.* Great Western Railway Company – – – 1
Boyd *v.* Allen – – – 622
Broadbent *v.* Groves. *In re* Cockcroft – – – – 94
Burstall *v.* Fearon – – – 126
Butcher *v.* Pooler – – – 273

C.

PAGE
Campden Charities (No. 2), *In re* 213
Capital Fire Insurance Association, *In re* – – – – 408
Carew's Claim. *In re* Romford Canal Company – – – 85
Cartington Estate, *In re*. *In re* Beck – – – – – 608
Cavendish *v.* Cavendish – – 685
Chapel House Colliery Company, *In re* – – – – – 259
Chesterfield's (Earl of) Trusts, *In re* – – – – – 643
Cleather *v.* Twisden – – 731
Cockcroft, *In re*. Broadbent *v.* Groves – – – – 94
Colchester (Corporation of), Prestney *v.* – – – 376
Collyer, Sayers *v.* – – – 180
Credit Company, *Ex parte*. *In re* McHenry – – – 353
Cresswell, *In re*. Parkin *v.* Cresswell – – – – 102
———, Parkin *v.* *In re* Cresswell – – – – 102
Cropper *v.* Smith – – – 305
Crossfield *v.* Shurmur. Shurmur *v.* Sedgwick – – – 597

D.

Davidson *v.* Illidge. *In re* Illidge 654
Davies to Jones and Evans – 190
De Rosaz, *In re*. Rymer *v.* De Rosaz – – – – 684
———, Rymer *v.* *In re* De Rosaz – – – – 684
Duguid, Wilson *v.* – – – 244

E.

Earle and Webster's Contract, *In re* – – – – – 144

F.

Fearon, Burstall *v.* – – – 126
Finnis and Young to Forbes and Pochin (No. 1) – – – 587
(No. 2) – – – – 591
First Avenue Hotel Company, Parker *v.* – – – – 282
Forbes and Pochin, Finnis and Young to (No. 1) – – 587
(No. 2) – – – – 591
Forester, Upmann *v.* – – 231

G.

Gardner, Knight *v.* *In re* Knight 606
George, Wolverhampton and Staffordshire Banking Company *v.* – – – – 707
Gough's Trusts, *In re*. *Ex parte* Great Western Railway Company – – – – – 569
Granville (Earl) and Marsh, *In re* – – – – – 11
Great Eastern Railway Company and Manor of Lowestoft, *In re*. *Ex parte* Reeve – – 253
Great Western Railway Company, *Ex parte*. *In re* Gough's Trusts – – – – 569
———, Bonner *v.* – – – – 1
Green *v.* Smith. *In re* Smith – 672
Greer *v.* Young – – – 545
Groves, Broadbent *v.* *In re* Cockcroft – – – – – 94

H.

Hallett to Martin – – – 624
———, Symonds *v.* – – – 346
Harman and Uxbridge and Rickmansworth Railway Company, *In re* – – – 720
Harris, Mander *v.* *In re* March 222
Harrison *v.* Leutner – – 594
Harrop's Trusts, *In re* – – 717
Helder, *Ex parte*. *In re* Lewis 339
Helm, Hyman *v.* – – – 531
Homfray, Phillips *v.* – – 439
Humphries, *In re*. Smith *v.* Millidge – – – – 691
Hyman *v.* Helm – – – 531

I.

Illidge, *In re*. Davidson *v.* Illidge 654
———, Davidson *v.* *In re* Illidge 654

J.

PAGE

Jarvis, Miles *v.* – – – 633
Jones, *In re* – – – – 583
——— and Evans, Davies to – 190
———, Macleod *v.* – – – 289

K.

Kaltenbach *v.* Lewis – – 54
Kemp's Settled Estates, *In re* – 485
Kensington Vestry and Adams, *In re* – – – – – 199
Knight, *In re.* Knight *v.* Gardner – – – – – 606
——— *v.* Gardner. *In re* Knight – – – – 606

L.

Langen *v.* Tate – – – 522
Lascelles, Agar-Ellis *v.* *In re* Agar-Ellis – – – – 317
Lee and Hemingway, *In re* – 669
Lesingham's Trusts, *In re* – 703
Leutner, Harrison *v.* – – 594
Levinstein, Badische Anilin und Soda Fabrik *v.* – – – 156
Lewis, *In re.* *Ex parte* Helder 339
———, Kaltenbach *v.* – – 54
Limehouse Board of Works, *Ex parte.* *In re* Vallance – – 177
London and Staffordshire Fire Insurance Company, *In re* – 149
Lovering, *Ex parte.* *In re* Murrell – – – – – 31
Lowestoft (Manor of) and Great Eastern Railway Company, *In re.* *Ex parte* Reeve – 253

M.

McHenry, *Ex parte.* *In re* McHenry – – – – 35
———, *In re.* *Ex parte* Credit Company – – – – 353
Macleod *v.* Jones – – – 289
Manchester (Duke of), Smith *v.* 611
Manchester Economic Building Society, *In re* – – – 488
Manchester, Sheffield, and Lincolnshire Railway Company, Teebay *v.* – – – – 572
Mander *v.* Harris. *In re* March 222

PAGE

March, *In re.* Mander *v.* Harris 222
Marsh and Earl Granville, *In re* 11
Martin, Hallett to – – – 624
Metropolitan Board of Works and Bellamy, *In re* – – 387
Miles *v.* Jarvis – – – 633
Millidge, Smith *v.* *In re* Humphries – – – – 691
Morgan, *In re* – – – 114
Murrell, *In re* *Ex parte* Lovering – – – – – 31
Mutual Society, *In re* – 425, n.

N.

National Coffee Palace Company, *In re.* *Ex parte* Panmure – 367
Newcastle's (Duke of) Estates, *In re* – – – – – 129

O.

Orde, *In re* – – – – 271

P.

Palmer's (J. B.) Trade-Mark, *In re* – – – – – 504
Panmure, *Ex parte.* *In re* National Coffee Palace Company 367
Pannell, Swift *v.* – – – 210
Parker *v.* First Avenue Hotel Company – – – – 282
——— *v.* Winder. *In re* Wilson 664
Parkin *v.* Cresswell. *In re* Cresswell – – – – – 102
Peace and Waller, *In re* – – 405
Percy, *In re.* Percy *v.* Percy – 616
——— *v.* Percy. *In re* Percy – 616
Phillips *v.* Homfray – – 439
Pocock's Claim. *In re* Romford Canal Company – – – 85
Pooler, Butcher *v.* – – – 273
Prestney *v.* Colchester (Corporation of) – – – – 376
Preston, Tone *v.* – – – 739

R.

Raleigh, Vine *v.* – – – 238
Rasbotham *v.* Shropshire Union Railways and Canal Company 110

PAGE

Reeve, *Ex parte*. *In re* Manor of Lowestoft and Great Eastern Railway Company – 253
Romford Canal Company, *In re*. Pocock's Claim. Trickett's Claim. Carew's Claim – 85
Rymer *v.* De Rosaz. *In re* De Rosaz – – – – 684

S.

Sayers *v.* Collyer – – – 180
Sedgwick, Shurmur *v.* Crossfield *v.* Shurmur – – – 597
Sergenson *v.* Beloe. *In re* Watmough – – – – 280
Shropshire Union Railways and Canal Company, Rasbotham *v.* 110
Shurmur, Crossfield *v.* Shurmur *v.* Sedgwick – – – 597
——— *v.* Sedgwick. Crossfield *v.* Shurmur – – – 597
Smith, *In re*. Green *v.* Smith – 672
——— *v.* Armitage – – – 727
———, Cropper *v.* – – – 305
———, Green *v.* *In re* Smith – 672
——— *v.* Manchester (Duke of) 611
——— *v.* Millidge. *In re* Humphries – – – – 691
Stonor's Trusts, *In re* – – 195
Sunderland Building Society, Bell *v.* – – – – 618
Swift *v.* Pannell – – – 210
Symonds *v.* Hallett – – 346

T.

Tate, Langen *v.* – – – 522
Teebay *v.* Manchester, Sheffield, and Lincolnshire Railway Company – – – – 572
Thomas *v.* Williams – – 558
Tone *v.* Preston – – – 739
Trickett's Claim. *In re* Romford Canal Company – – 85
Twisden, Cleather *v.* – – 731

U.

Upmann *v.* Forester – – 231
Uxbridge and Ricksmanworth Railway Company and Harman, *In re* – – – – 720

V.

Vallance, *In re*. *Ex parte* Limehouse Board of Works – – 177
Vine *v.* Raleigh – – – 238

W.

Walker and Hughes' Contract, *In re* – – – – 698
Warburg, *Ex parte*. *In re* Whalley – – – – – 364
Watmough, *In re*. Sergenson *v.* Beloe – – – – 280
Whalley, *In re*. *Ex parte* Warburg – – – – – 364
Williams, Thomas *v.* – – 558
Wilson, *In re*. Parker *v.* Winder 664
——— *v.* Duguid – – – 244
Winder, Parker *v.* *In re* Wilson 664
Witton, *In re*. *Ex parte* Arnal 26
Wolverhampton and Staffordshire Banking Company *v.* George – – – – 707
Wright's Trusts, *In re* – – 662

Y.

Young, Greer *v.* – – – 545

TABLE OF CASES CITED.

A.

		PAGE
Adair *v.* Young	12 Ch. D. 13	233
—— *v.* ——	11 Ch. D. 136	307
Agar *v.* Athenæum Life Assurance Society	3 C. B. (N.S.) 725	87
Agar-Ellis, In re	10 Ch. D. 49	318
Agra & Masterman's Bank, In re	Law Rep. 2 Ch. 391	92
Allen *v.* Walker	Law Rep. 5 Ex. 187	348
Andrews, In re	Law Rep. 8 Q. B. 153	321
—— *v.* Salt	Law Rep. 8 Ch. 622	321
Anglo-Italian Bank *v.* Davies	9 Ch. D. 275	406
Anon.	2 Vent. 347	107
Anthony *v.* Rees	2 Cr. & J. 75	193
Armstrong *v.* Stokes	Law Rep. 7 Q. B. 598	59
Ashley's Case	Law Rep. 9 Eq. 263	153
Athenæum Life Assurance Society *v.* Pooley	3 De G. & J. 294	89
Atkinson *v.* Macreth	Law Rep. 2 Eq. 570	732
Attorney-General *v.* Clack	1 Beav. 467	564
—— *v.* Doyley	2 Eq. C. Ab. 195	246
—— *v.* Great Northern Railway Company	1 Dr. & Sm. 154	3
—— *v.* Heelis	2 S. & S. 67	590
—— *v.* Mid-Kent Railway Company	Law Rep. 3 Ch. 100	186
—— *v.* Nichol	16 Ves. 338	284
—— *v.* Rees	12 Beav. 50	113
—— *v.* Swansea Improvements and Tramways Company	9 Ch. D. 46	305
Attree *v.* Hawe	9 Ch. D. 337	687

B.

Bagley *v.* Mollard	1 Russ. & My. 581	692
Baile *v.* Baile	Law Rep. 13 Eq. 497	550
Bailey *v.* Birchall	2 H. & M. 371	547
Baily's Case	Sir T. Raym. 71	459
Bain *v.* Sadler	Law Rep. 12 Eq. 570	656
Baker *v.* Henderson	4 Sim. 27	416
Banister, In re	12 Ch. D. 131	15
Barber *v.* Mackrell	12 Ch. D. 534	728

		PAGE
Bareham, In re	17 Ch. D. 329	570
Barret *v.* Blagrave	6 Ves. 104	184
Bartlett *v.* Wood	9 W. R. 817	728
Barton *v.* Tattersall	1 Russ. & My. 237	675
Beavan *v.* Beavan	24 Ch. D. 649, n.	643
Bedford (Duke of) *v.* British Museum (Trustees of)	2 My. & K. 552	180
——— *v.* Dawson	Law Rep. 20 Eq. 353	578
Belaney *v.* Ffrench	Law Rep. 8 Ch. 918	408
Bennett *v.* Harfoot	19 W. R. 428	707
Berdan *v.* Greenwood	20 Ch. D. 764, n.	522
Berrie *v.* Howitt	Law Rep. 9 Eq. 1	547
Biggs *v.* Peacock	20 Ch. D. 200; 22 Ch. D. 285	622
Birch *v.* Wade	3 V. & B. 198	246
——— *v.* Wright	1 T. R. 378	442
Blakely Ordnance Company, In re	Law Rep. 3 Ch. 154	91
Blakemore *v.* Glamorganshire Canal Company	1 My. & K. 154	3
Blest *v.* Brown	4 D. F. & J. 367	59
Bloxam *v.* Metropolitan Railway Company	Law Rep. 3 Ch. 337	614
Blyth and Young, In re	13 Ch. D. 416	492
Bolckow *v.* Fisher	10 Q. B. D. 161	110
Bonnardet *v.* Taylor	1 J. & H. 383	378
Bonser *v.* Bradshaw	30 L. J. (Ch.) 159; 4 Giff. 260	550
Bos *v.* Helsham	Law Rep. 2 Ex. 72	575
Boss, Ex parte	Law Rep. 18 Eq. 375	40
Bostock *v.* Floyer	Law Rep. 1 Eq. 26	392
——— *v.* North Staffordshire Railway Company	5 De G. & Sm. 584; 4 E. & B. 798; 3 Sm. & Giff. 283	2
Boughton *v.* Boughton	23 Ch. D. 169	408
Bourdillon *v.* Roche	27 L. J. (Ch.) 681	392
Bowes *v.* Hope Life Insurance Company	11 H. L. C. 389	264
Boyes *v.* Bedale	1 H. & M. 798	637
Brackenbury *v.* Gibbons	2 Ch. D. 417	633
Brassington *v.* Brassington	1 S. & S. 455	416
Bricker *v.* Whatley	1 Vern. 233	223
Brighton Hotel Company, In re	Law Rep. 6 Eq. 339	264
Brigstocke, Ex parte	4 Ch. D. 348	38
Brompton (Incumbent of), Ex parte	5 De G. & Sm. 626	215
Brown *v.* Higgs	8 Ves. 561	246
——— *v.* ———	4 Ves. 708; 5 Ves. 495; 8 Ves. 561; 18 Ves. 192	249
——— *v.* Sewell	16 Ch. D. 517	377
Bruce *v.* Garden	Law Rep. 5 Ch. 32	712
Brunton's Claims	Law Rep. 19 Eq. 302	88
Bryant *v.* Bull	10 Ch. D. 153	406
Buckland *v.* Papillon	Law Rep. 2 Ch. 67	204
Bulley *v.* Bulley	8 Ch. D. 479	547
Burgess *v.* Burgess	3 D. M. & G. 896	234
——— *v.* Hills	26 Beav. 244	234
——— *v.* Northwick Local Board	6 Q. B. D. 264	578
Burrough *v.* Philcox	5 My. & Cr. 72	247
Burroughs, In re	5 Ch. D. 601	16
Bush *v.* Allen	5 Mod. 63	192
Bushby *v.* Munday	5 Madd. 297	535
Bustros *v.* Bustros	30 W. R. 374	382
Butterfield *v.* Heath	15 Beav. 408	604
Byng *v.* Strafford (Lord)	5 Beav. 558	617

C.

		PAGE
Camberwell and South London Building Society *v.* Holloway	13 Ch. D. 754	21
Campden Charities, In re	18 Ch. D. 310	213
Cardross's Settlement, In re	7 Ch. D. 728	135
Carron Iron Company *v.* Maclaren	5 H. L. C. 416	533
Carter *v.* Stubbs	6 Q. B. D. 116	493
Cartwright *v.* Cartwright	3 D. M. & G. 982	348
——— *v.* Vaudry	5 Ves. 530	692
Catlow *v.* Catlow	2 C. P. D. 362	551
Charlton, Ex parte	6 Ch. D. 45	39
Chauncy *v.* Graydon	2 Atk. 616	107
Cheavon *v.* Walker	5 Ch. D. 850	510
Christie *v.* Gosling	Law Rep. 1 H. L. 279	105
Churchward *v.* Ford	2 H. & N. 446	443
City Bank, Ex parte	Law Rep. 3 Ch. 758	92
City of London Brewery Company *v.* Tennant	Law Rep. 9 Ch. 212	284
Clare Hall (Master of) *v.* Harding	6 Hare, 273	184
Clarence *v.* Marshall	2 C. & M. 495	462
Clark *v.* London School Board	Law Rep. 9 Ch. 120	578
Clarke *v.* Colls	9 H. L. C. 601	705
——— *v.* Willott	Law Rep. 7 Ex. 313	16
Cobb, Ex parte	Law Rep. 8 Ch. 727	41
Collen *v.* Wright	7 E. & B. 301; 8 E. & B. 647	369
Collett *v.* Dickenson	11 Ch. D. 687	406
Collingwood *v.* Row	26 L. J. (Ch.) 649	202
Comer *v.* Bromley	5 De G. & Sm. 532	733
Connor, In re	16 Ir. C. L. Rep. 112	320
Coope *v.* Carter	2 D. M. & G. 292	728
Cooper *v.* Cooper	2 Ch. D. 492	306
——— *v.* Macdonald	7 Ch. D. 288	605
——— *v.* Vesey	20 Ch. D. 611	276
——— *v.* Whittingham	15 Ch. D. 501	233
Cox *v.* Cox	Law Rep. 8 Eq. 343	648
Cracknall *v.* Janson	6 Ch. D. 735	620
Creuze *v.* Hunter	2 Cox, 242	322
Crofton *v.* Crofton	20 Ch. D. 760	526
Crook *v.* Seaford Corporation	Law Rep. 6 Ch. 551	575
Crowder *v.* Stewart	16 Ch. D. 368	658
Croxon *v.* Lever	12 W. R. 237	707
Curnick *v.* Tucker	Law Rep. 17 Eq. 320	200
Currie *v.* Nind	1 My. & Cr. 17	604
Curtis, In re	28 L. J. (Ch.) 458	337
——— *v.* Platt	Goodeve on Patents, p. 102	172
——— *v.* Sheffield	21 Ch. D. 1	492

D.

Dalrymple *v.* Hall	16 Ch. D. 715	705
Dalton *v.* Angus	6 App. Cas. 740	739
Daly's Settlement, In re	25 Beav. 456	178
D'Angibau, In re	15 Ch. D. 228	136
Delaney *v.* Delaney	27 Sol. J. 418	126
De Manneville *v.* De Manneville	10 Ves. 52	322

		PAGE
Dering *v.* Winchelsea (Earl of)	1 W. & T. L. C. 5th Ed. 106; 1 Cox, 318	714
De Vitre *v.* Betts	Law Rep. 6 H. L. 319	233
D'Huart *v.* Harkness	34 Beav. 324	178
Dias *v.* De Livera	5 App. Cas. 123	224
Dickson *v.* Harrison	9 Ch. D. 243	382
——— *v.* Swansea Vale and Neath and Brecon Junction Railway Company	Law Rep. 4 Q. B. 44	87
Dobson *v.* Faithwaite	30 Beav. 228	126
Doe *v.* Gillard	5 B. & Ald. 785	193
—— *v.* Pratt	6 Ad. & E. 180	193
—— *v.* Vardill	7 Cl. & F. 895; 6 Bing. N. C. 385; 9 Bl. (N.S.) 32	638
—— *v.* Woodhouse	4 T. R. 89	192
Doncaster Permanent Building Society, In re	Law Rep. 3 Eq. 158	428
Dorin *v.* Dorin	Law Rep. 7 H. L. 568	693
Doyle *v.* Kaufman	3 Q. B. D. 340	492
Draper *v.* Manchester, Sheffield, and Lincolnshire Railway Company	3 D. F. &. J. 23	378
Drysdale *v.* Piggott	8 D. M. & G. 546	712
Dundonald (Earl of) *v.* Masterman	Law Rep. 7 Eq. 504	731

E.

Eastwood *v.* Lever	4 D. J. & S. 114	184
Ebbs *v.* Boulnois	Law Rep. 10 Ch. 479	677
Ecclesiastical Commissioners *v.* Kino	14 Ch. D. 213	289
——— *v.* North Eastern Railway Company	4 Ch. D. 845	451
Eden *v.* Thompson	2 H. & M. 6	569
Edmunds *v.* Fessey	29 Beav. 233	696
Edwards *v.* West	7 Ch. D. 858	203
Elbinger Actien-Gesellschafft *v.* Armstrong	Law Rep. 9 Q. B. 473	68
Ellis *v.* Houstoun	10 Ch. D. 236	697
Emden *v.* Carte	19 Ch. D. 311	547
Erskine *v.* Adeane	Law Rep. 8 Ch. 756	185
Estates Investment Company, In re	Law Rep. 8 Eq. 227	492
Esther Lyons, Re	22 L. T. (N.S.) 770	321
Evans *v.* Davis	10 Ch. D. 747	184
——— *v.* Smallcombe	Law Rep. 3 H. L. 249	153
Evans' Settlement, In re	14 Ch. D. 511	663

F.

Faithfull *v.* Ewen	7 Ch. D. 495	547
Fane *v.* Fane	13 Ch. D. 228	728
Farrow *v.* Austin	18 Ch. D. 58	276
Fenning, Ex parte	3 Ch. D. 455	41, 353
Ferguson *v.* Gibson	Law Rep. 14 Eq. 379	654
Fettiplace *v.* Gorges	1 Ves. 46	604
Finch *v.* Hollingsworth	21 Beav. 112	246
Flockton *v.* Peake	12 W. R. 1023	596
Forbes *v.* Jackson	19 Ch. D. 615	712
Forster *v.* Abraham	Law Rep. 17 Eq. 351	487

		PAGE
Fort *v.* Oliver	1 M. & S. 242	442
Foster & Lister, In re	6 Ch. D. 87	603
—— *v.* Great Western Railway Company	8 Q. B. D. 25, 515	273
—— *v.* Stewart	3 M. & S. 191	460
Fountaine *v.* Carmarthen Railway Company	Law Rep. 5 Eq. 316	87
Freer *v.* Hesse	4 D. M. & G. 495	16
Fritz *v.* Hobson	14 Ch. D. 542	491
Fuentes *v.* Montis	Law Rep. 3 C. P. 268	58
Fullwood *v.* Fullwood	9 Ch. D. 176	183

G.

Gadd, In re	23 Ch. D. 134	562
Galsworthy *v.* Durrant	2 D. F. & J. 466	675
Gardiner *v.* Fell	1 Jac. & W. 22	465
Garnett *v.* Bradley	3 App. Cas. 944	671
Garth *v.* Cotton	1 Dick. 183	473
Gaskin *v.* Balls	13 Ch. D. 324	185
Gaved *v.* Martin	19 C. B. (N.S.) 732	741
Geisel, Ex parte	22 Ch. D. 436	492
German *v.* Chapman	7 Ch. D. 271	184
Ghost *v.* Waller	9 Beav. 497	389
Gibbs, Ex parte	Law Rep. 10 Ch. 382	48
—— & West's Case	Law Rep. 10 Eq. 312	417
Gibson *v.* Fisher	Law Rep. 5 Eq. 51	665
Gill *v.* Shelley	2 Russ. & My. 336	692
Gisborne *v.* Gisborne	2 App. Cas. 300	562
Godwin *v.* Francis	Law Rep. 5 C. P. 295	370
Gooch's Estate, In re	3 Ch. D. 742	663
Goodman *v.* Goodman	3 Giff. 643	641
Goodman's Trusts, In re	17 Ch. D. 266	637
Gore Langton's Estates, In re	Law Rep. 10 Ch. 328	510
Gosling *v.* Gosling	1 D. J. & S. 1	105
Grabowski's Settlement, In re	Law Rep. 6 Eq. 12	652
Great Western (Forest of Dean) Coal Consumers Company, In re	21 Ch. D. 769	263
Green *v.* Green	5 Hare, 400, n.	348
—— *v.* Harvey	1 Hare, 428	617
—— *v.* Low	22 Beav. 625	204
—— *v.* Smith	1 Atk. 572	204
Grieveson *v.* Kirsopp	2 Keen, 653	247
Griffith, Ex parte	23 Ch. D. 69	676
Grimes *v.* Harrison	27 Beav. 198	596
Guinness *v.* Land Corporation of Ireland	22 Ch. D. 349	614
Gully *v.* Cregoe	24 Beav. 185	203

H.

Hackett *v.* Baiss	Law Rep. 20 Eq. 494	282
Hall *v.* Macdonald	14 Sim. 1	656
—— *v.* Robinson	8 Irèdell, 56	712
Halstead United Charities, In re	Law Rep. 20 Eq. 48	570
Hambly *v.* Trott	1 Cowp. 371	443

		PAGE
Hamer *v.* Giles	11 Ch. D. 945	275
Hancocks *v.* Lablache	3 C. P. D. 197	406
Harding *v.* Glyn	1 Atk. 469	246
——— *v.* Harding	Law Rep. 13 Eq. 493	97
Hare, Ex parte	1 Deac. 16; 2 Mont. & A. 478	33
Harman *v.* Johnson	2 E. & B. 61	734
Harrington (Countess of) *v.* Harrington (Earl of)	Law Rep. 5 H. L. 87	105
Harrop's Trusts, In re	24 Ch. D. 717	663
Hasluck *v.* Pedley	Law Rep. 19 Eq. 271	225
Hawkins *v.* Parsons	10 W. R. 377	275
Haynes *v.* Barton	1 Dr. & Sm. 483	122
Heatley *v.* Newton	19 Ch. D. 326	382
Hellier *v.* Silleox	19 L. J. (Q.B.) 295	461
Hervey *v.* Smith	1 K. & J. 389	3
Hewison *v.* Negus	16 Beav. 594	603
Heymann *v.* European Central Railway Company	Law Rep. 7 Eq. 154	153
Heywood *v.* Heywood	29 Beav. 9	705
Higgs *v.* Northern Assam Tea Company	Law Rep. 4 Ex. 387	91
Hill, Ex parte	23 Ch. D. 695	676
—— *v.* Crook	Law Rep. 6 H. L. 265	693
—— *v.* Hill	10 N. R. 400	321
Hoare *v.* Byng	10 Cl. & F. 508	617
Hobson's Trusts, In re	7 Ch. D. 708	663
Hogg *v.* Jones	32 Beav. 45	102
Hole *v.* Bradford	Sir T. Raym. 57	445
Holloway *v.* Cheston	19 Ch. D. 516	382
Holmes *v.* Newcastle-upon-Tyne Freehold Abattoir Company	1 Ch. D. 682	614
——— *v.* Prescott	10 Jur. (N.S.) 507	634
Holsgrove *v.* Hedges	24 L. J. (Ch.) 456	680
Hoole *v.* Great Western Railway Company	Law Rep. 3 Ch. 262	614
Hope *v.* Liddell	21 Beav. 183	388
Hopkins, Ex parte	3 P. Wms. 151	322
Househill Coal and Iron Company *v.* Neilson	1 Web. Pat. Cas. 685	172
Howe *v.* Dartmouth (Earl of)	7 Ves. 137	562
Hudson *v.* Cook	Law Rep. 13 Eq. 417	96
Hughes *v.* Graeme	33 L. J. (Q.B.) 335	370
Hulet's Case	2 J. & H. 306	88
Hume *v.* Bentley	5 De G. & Sm. 520	20
Hutchinson & Tennant, In re	8 Ch. D. 540	200
Hutton *v.* Bulloch	Law Rep. 8 Q. B. 331; 9 Q. B. 572	70
Hyde & Co.'s Trade-mark, In re	7 Ch. D. 724	512

I.

Imperial Gas Light and Coke Company *v.* Broadbent	7 H. L. C. 600	184
Ireland *v.* Champneys	4 Taunt. 884	442
Irvine *v.* Sullivan	Law Rep. 8 Eq. 673	204
Isherwood, Ex parte	22 Ch. D. 384	26
Izard, Ex parte	23 Ch. D. 115	26

J.

		PAGE
Jackson's Will, In re	13 Ch. D. 189	247
Jacson *v.* Queen Anne's Bounty (Governors of)	15 Ch. D. 561	687
James, Ex parte	Law Rep. 9 Ch. 609	39
Jay, Ex parte	Law Rep. 9 Ch. 133	39
Jeffery, Ex parte	Law Rep. 9 Ch. 144	46
Jervis *v.* Lawrence	22 Ch. D. 202	687
Jewan *v.* Whitworth	Law Rep. 2 Eq. 692	69
Job *v.* Job	6 Ch. D. 562	728
Johnson *v.* Fesenmeyer	25 Beav. 88; 3 De G. & J. 13	59
Johnstone *v.* Beattie	10 Cl. & F. 42	321
——— *v.* Cox	19 Ch. D. 17	275
Jones, Ex parte	14 Ch. D. 624	570
——— *v.* Chennell	8 Ch. D. 492	276
——— *v.* Verney	Willes, 169	629
Jones' Trust Estate, In re	18 W. R. 312	570
Jupe *v.* Pratt	1 Web. Pat. Cas. 146	171

K.

Keane, In re	Law Rep. 12 Eq. 115	547
Kelly, Ex parte	7 Ch. D. 161	672
Kemp *v.* Sober	1 Sim. (N.S.) 517	186
King *v.* Withers	Cas. t. Tal. 117	107
Kinlock *v.* Neville	6 M. & W. 795	741
Kirk *v.* Todd	21 Ch. D. 484	442
Kirkwood, Ex parte	11 Ch. D. 724	479
Knapp *v.* Williams	4 Ves. 430, n.	686
Knox *v.* Turner	Law Rep. 5 Ch. 515	712

L.

Ladbury, Ex parte	17 Ch. D. 532	27
Lake *v.* Brutton	8 D. M. & G. 440	712
Lambe *v.* Evans	Law Rep. 6 Ch. 597	200
Lambert *v.* Thwaites	Law Rep. 2 Eq. 151	247
Lamine *v.* Dorrell	2 Ld. Raym. 1216	462
Lancaster Banking Corporation, Ex parte	10 Ch. D. 776	678
Landowners' West of England and South Wales Land Drainage and Inclosure Company *v.* Ashford	16 Ch. D. 411	88
Lansdowne (Marquis of) *v.* Lansdowne (Marchioness Dowager of)	1 Madd. 116	443
Lawes *v.* Bennett	1 Cox, 167	202
Lawrence's Case	Law Rep. 2 Ch. 412	153
Lea *v.* Hinton	5 D. M. & G. 823	712
Learoyd *v.* Robinson	12 M. & W. 745	58
Lechmere and Lloyd, In re	18 Ch. D. 524	633
Lee *v.* Haley	Law Rep. 5 Ch. 155	184
Leeds (Duke of) *v.* Amherst (Earl)	2 Ph. 117	185
Leeming *v.* Sherratt	2 Hare, 14	106
Lemaitre *v.* Davis	19 Ch. D. 281	740
Le Marchant *v.* Le Marchant	Law Rep. 18 Eq. 414	200
Leuckart *v.* Cooper	3 Scott, 521; 3 Bing. N. C. 99	69, 79
Lightly *v.* Clouston	1 Taunt. 112	462

		PAGE
Linoleum Manufacturing Company *v.* Nairn	7 Ch. D. 834	509
Liverpool Improvement Act, In re	Law Rep. 5 Eq. 282	122
Llanover *v.* Homfray	19 Ch. D. 224	441
Lloyd *v.* Jones	27 W. R. 655	547
London and Mediterranean Bank, In re	15 N. R. 33	491
London and North Western Railway Company *v.* Lancashire and Yorkshire Railway Company	Law Rep. 4 Eq. 174	3
London and South Western Railway Company *v.* Gomm	20 Ch. D. 562	202
London, Chatham, and Dover Railway Company *v.* Bull	47 L. T. (N.S.) 413	183
London Suburban Bank, In re	Law Rep. 6 Ch. 641	264
Loomes *v.* Stotherd	1 S. & S. 458	656
Lowes *v.* Lush	14 Ves. 547	16
Lyones *v.* Blenkin	Jac. 245	321
Lysaght *v.* Edwards	2 Ch. D. 499	97

M.

McAndrew *v.* Barker	7 Ch. D. 701	492
McHenry, Ex parte	24 Ch. D. 35	354
——— *v.* Lewis	22 Ch. D. 397	533
M'Kenna, Ex parte	3 D. F. & J. 645	33
Maclean *v.* Vaughan	20 Sol. J. 723	306
Macnee *v.* Gorst	Law Rep. 4 Eq. 315	58
Malins *v.* Freeman	2 Keen, 25	369
Mallinson *v.* Mallinson	Law Rep. 1 P. & D. 221	321
Malpas *v.* Ackland	3 Russ. 273	724
Manners (Lord) *v.* Johnson	1 Ch. D. 673	186
Mansel, In re	7 Ch. D. 711	492
Marchant *v.* Cragg	31 Beav. 398	223
Marland, Ex parte	Law Rep. 20 Eq. 777	39
Marlborough (Duke of) *v.* Godolphin	2 Ves. Sen. 61	247
Marsh *v.* Keating	2 Cl. & F. 250	733
Martelli *v.* Holloway	Law Rep. 5 H. L. 532	106
Maspons *v.* Mildred	9 Q. B. D. 530	68
Mayer *v.* Murray	8 Ch. D. 424	728
Megson *v.* Hindle	15 Ch. D. 198	692
Melbourne Banking Corporation *v.* Brougham	4 App. Cas. 156	575
Mellin *v.* Monico	3 C. P. D. 142	167
Merceron, In re	7 Ch. D. 184	670
Mercers' Company, Ex parte	10 Ch. D. 481	669
Metropolitan District Railway Company and Cosh, In re	13 Ch. D. 607	577
Milan Tramways Company, In re	22 Ch. D. 122	492
Miller *v.* Sawyer	30 Vermont, 412	712
Millington *v.* Fox	3 My. & Cr. 338	233
Monypenny *v.* Bristow	2 Russ. & My. 117	450
Mortlock *v.* Buller	10 Ves. 292	561
Moylan, In re	16 Beav. 220	680
Mulliner *v.* Midland Railway Company	11 Ch. D. 611	577
Mullings *v.* Trinder	Law Rep. 10 Eq. 449	16
Mussoorie Bank *v.* Raynor	7 App. Cas. 321	204
Mutual Society, In re	24 Ch. D. 425, n	431

N.

		PAGE
Natal Investment Company, In re	Law Rep. 3 Ch. 355	89
National Provincial Plate Glass Insurance Company *v.* Prudential Assurance Company	6 Ch. D. 757.	184
Navulshaw *v.* Brownrigg	2 D. M. & G. 441	59
Neilson *v.* Betts	Law Rep. 5 H. L. 1	235, 307
New Callao, In re	22 Ch. D. 484	489
New Zealand and Australian Land Company *v.* Watson	7 Q. B. D. 374	59
Newcastle's (Duke of) Estates, In re	24 Ch. D. 129	147
Newton *v.* Chorlton	10 Hare, 646	712
Norris, Re	Weekly Notes, 1883, pp. 35, 65	622
North Staffordshire Railway Company *v.* Dale	8 E. & B. 836	578
Norton *v.* London and North Western Railway Company	9 Ch. D. 623	1
Norwich and Norfolk Building Society, In re	45 L. J. (Ch.) 785	429
Norwich Yarn Company, In re	22 Beav. 143	152
Nutter *v.* Accrington Local Board	4 Q. B. D. 375	578

O.

Oates *v.* Cook	Burr. 1684	193
Otter *v.* Vaux (Lord)	6 D. M. & G. 638	620
Otto *v.* Lindford	18 Ch. D. 394	306

P.

Padstow Total Loss and Collision Assurance Association, In re	20 Ch. D. 137	492
Palmer *v.* Simmonds	2 Drew. 221	205
Patent Floor Cloth Company, In re	Law Rep. 8 Eq. 664	491
Pearl *v.* Deacon	1 De G. & J. 461	712
Peek *v.* Gurney	Law Rep. 6 H. L. 377	443
—— *v.* Matthews	Law Rep. 3 Eq. 515	184
Peirce *v.* Jersey Waterworks Company	Law Rep. 5 Ex. 209	89
Pelham *v.* Gregory	3 Bro. P. C. 204	105
Pendlebury *v.* Walker	4 Y. & C. (Ex.) 441	714
Perceval *v.* Perceval	Law Rep. 9 Eq. 386	634
Perry *v.* Merritt	Law Rep. 18 Eq. 152.	617
Peruvian Guano Company *v.* Bockwoldt	23 Ch. D. 225	536
Pettet's Estate, In re	1 Ch. D. 478.	676
Phenê's Trusts, In re	Law Rep. 5 Eq. 346	246
Phillips *v.* Caldcleugh	Law Rep. 4 Q. B. 159	16
——— *v.* Huth	6 M. & W. 572	58
Phosphate of Lime Company *v.* Green	Law Rep. 7 C. P. 43	153
Piggott *v.* Stratton	1 D. F. & J. 33	575
Pinbury *v.* Elkin	1 P. Wms. 563	105
Pinchon's Case	9 Rep. 86 b	457
Pinkerton *v.* Easton	Law Rep. 16 Eq. 490.	547
Player *v.* Foxall	1 Russ. 538	656
Plimpton *v.* Malcomson	Law Rep. 20 Eq. 37	176
Plomley, Re	47 L. T. (N.S.) 283	322

		PAGE
Plumer *v.* Gregory	Law Rep. 18 Eq. 621.	737
Polini *v.* Gray	12 Ch. D. 438	307
Ponsardin *v.* Peto	33 Beav. 642	233
Pope *v.* Whitcombe	3 Mer. 689	246
Portalis *v.* Tetley	Law Rep. 5 Eq. 140	73
Powell *v.* Aiken	4 K. & J. 343	442
—— *v.* Rees	7 Ad. & E. 426	443
Prentice *v.* Phillips	2 Hare, 152	378
Price *v.* Jenkins	5 Ch. D. 619	15, 603
Prince of Wales Assurance Society *v.* Athenæum Life Assurance Society	3 C. B. (N.S.) 756, n	87
Pritchard *v.* Roberts	Law Rep. 17 Eq. 222.	550
Pulteney *v.* Warren	6 Ves. 73	450
Pyrke *v.* Waddingham	10 Hare, 1	16

Q.

Queen's Benefit Building Society, In re	Law Rep. 6 Ch. 815	428

R.

Rawlins *v.* Wickham	3 De G. & J. 304	152
Redgrave *v.* Hurd	20 Ch. D. 1	152
Reg. *v.* Clarke	7 E. & B. 186	320
—— *v.* Howes	3 E. & E. 332	320
Renals *v.* Cowlishaw	9 Ch. D. 125	741
Rex *v.* Greenhill	4 Ad. & E. 624	320
Rhodes *v.* Whitehead	2 Dr. & Sm. 532	634
Richardson *v.* Williamson	Law Rep. 6 Q. B. 276	370
Ridler, In re	22 Ch. D. 74	16, 603
Rio Grande do Sul Steamship Company, In re	5 Ch. D. 282	276
Robertson *v.* Armstrong	28 Beav. 123	388
—— *v.* Pickering	16 Ch. D. 660	676
—— *v.* Robinson	1 D. M. & G. 247; 11 Beav. 371	687
—— *v.* Shepherd	4 D. J. & S. 129	665
Rochford *v.* Hackman	Kay, 308	323
Roderick *v.* Aston Local Board	5 Ch. D. 328	578
Rolls *v.* St. George the Martyr (Vestry of)	14 Ch. 785	577
Roper *v.* Williams	T. & R. 18	184
Ross *v.* Ross	1 Jac. & W. 154	617
Royal British Bank *v.* Turquand	5 E. & B. 248; 6 E. & B. 327.	87
Royal Society of London and Thompson	17 Ch. D. 407	593
Ryder *v.* Ryder	2 Sw. & Tr. 225	321

S.

St. Aubyn *v.* Smart	Law Rep. 5 Eq. 183	732
St. John *v.* St. John	11 Ves. 526	348
St. Katharine (Hospital of), Ex parte	17 Ch. D. 378	670
St. Nazaire Company, In re	12 Ch. D. 88	490
St. Thomas's Dock Company, In re	2 Ch. 116	264
Salt *v.* Cooper	16 Ch. D. 544	406

		PAGE
Salusbury *v.* Denton	3 K. & J. 529	247
Sandwich (Earl of) *v.* Great Northern Railway Company	10 Ch. D. 707	4
Scholefield *v.* Lockwood	Law Rep. 7 Eq. 83	547
Semenza *v.* Brinsley	18 C. B. (N.S.) 467	73
Shanahan, In re	20 L. T. 183	320
Sharpley *v.* Louth and East Coast Railway Company	2 Ch. D. 663	153
Shaw *v.* Gould	Law Rep. 3 H. L. 55	640
Sherrington's (Sir Henry) Estate, In re	Savile, 40	457
Shields Marine Insurance Company, In re	W. N. 1867, p. 296	491
Shiers, Ex parte	7 Ch. D. 416	38
Shovelton *v.* Shovelton	32 Beav. 143	203
Silver Valley Mines, In re	21 Ch. D. 381	276
Simons *v.* Patchett	7 E. & B. 568	370
Singer Machine Manufacturers *v.* Wilson	3 App. Cas. 376	509
——— Manufacturing Company *v.* Loog	8 App. Cas. 15	233
Skottowe *v.* Young	Law Rep. 11 Eq. 474	641
Sleight *v.* Lawson	3 K. & J. 292	728
Smith, In re	22 Ch. D. 586	676
——— *v.* Eyles	2 Atk. 385	442
Solomon, Ex parte	20 Ch. D. 281	355
South Essex Estuary Company, In re	Law Rep. 11 Eq. 157	88
———, In re	Law Rep. 4 Ch. 215	410
Spackman *v.* Evans	Law Rep. 3 H. L. 171	153
Spalding *v.* Ruding	6 Beav. 376	58
Spedding *v.* Nevell	Law Rep. 4 C. P. 212	370
Speight *v.* Gaunt	22 Ch. D. 727	393
Stamford (Earl of) *v.* Dawson	Law Rep. 4 Eq. 352	596
Stanley *v.* Wise	1 Cox, 432	105
Steel *v.* Dixon	17 Ch. D. 825	712
Stewart's Case	Law Rep. 1 Ch. 574	152
Stourton *v.* Stourton	8 D. M. & G. 760	321
Stubbins, Ex parte	17 Ch. D. 58	341
Swindon Waterworks Company *v.* Wilts and Berks Canal Navigation Company	Law Rep. 7 H. L. 697	1
Symon, In re	21 Ch. D. 757	728

T.

Taite's Case	Law Rep. 3 Eq. 795	153
Talbot *v.* Shrewsbury (Earl of)	4 My. & Cr. 672	322
Tatnall *v.* Hankey	2 Moo. P. C. 342	178
Taylor, In re	4 Ch. D. 157	322
——— *v.* Graham	3 App. Cas. 1287	107
——— *v.* Meads	34 L. J. (Ch.) 203	349
——— *v.* ———	4 D. J. & S. 597	604
——— *v.* Taylor	Law Rep. 20 Eq. 297; 1 Ch. D. 426; 3 Ch. D. 145	239
Teasdale *v.* Braithwaite	4 Ch. D. 85; 5 Ch. D. 630	603
Tempest, In re	Law Rep. 1 Ch. 485	486
——— *v.* Camoys (Lord)	21 Ch. D. 571	562
Terrell, Ex parte	4 Ch. D. 293	41
———, In re	22 Ch. D. 473	596
Tew *v.* Jones	13 M. & W. 12	450
Theed *v.* Debenham	2 Ch. D. 165	284
Thomas *v.* Dering	1 Keen, 729	562

		PAGE
Thomas *v.* Pinnell	15 Beav. 148	680
Tickle *v.* Brown	4 Ad. & E. 369	741
Tooley *v.* Windham	Cro. Eliz. 206	458
Tootal's Trusts, In re	23 Ch. D. 532	178
Townley *v.* Bedwell	14 Ves. 591	202
Trent *v.* Hanning	7 East, 97	193
—— *v.* Trent	1 Dow. 102	193
Tucker, Ex parte	12 Ch. D. 308	492
Tucke's (Sir Brian) Case	3 Leon. 241	458
Tulk *v.* Moxhay	2 Ph. 774	186, 741
Turner *v.* Cameron's Coalbrook Steam Coal Company	5 Ex. 932	450
—— *v.* Hancock	20 Ch. D. 303	276
Twynam *v.* Porter	Law Rep. 11 Eq. 181	547

U.

United Land Company *v.* Great Eastern Railway Company	Law Rep. 17 Eq. 158; 10 Ch. 586	2
Unwin *v.* Heath	2 Web. Pat. Cas. 302	170
Upmann *v.* Elkan	Law Rep. 12 Eq. 140; 7 Ch. 130	233
Uruguay Central and Hygueritas Railway Company of Monte Video, In re	11 Ch. D. 372	259

V.

Vertue *v.* East Anglian Railway Company	5 Ex. 280	88
Villars, Ex parte	Law Rep. 9 Ch. 432	47
Viney *v.* Chaplin	3 De G. & J. 468	389

W.

Wace *v.* Mallard	21 L. J. (Ch.) 355	203
Waite *v.* Bingley	21 Ch. D. 674	178
Walker, Ex parte	22 Ch. D. 813	37
Warburton *v.* Edge	9 Sim. 508	416
Ward *v.* Painter	5 My. & Cr. 298	675
Warrington *v.* Warrington	2 Hare, 54	223
Watkins *v.* Williams	3 Mac. & G. 622	617
Webb *v.* Herne Bay (Commissioners of)	Law Rep. 5 Q. B. 642	88
—— *v.* Ledsam	1 K. & J. 385	390
Weil, Ex parte	5 Ch. D. 345	479
Welchman, Ex parte	11 Ch. D. 48	676
Wellesley *v.* Beaufort (Duke of)	2 Russ. 1	323
—— *v.* Wellesley	2 Bli. (N.S.) 124	322
Werdermann *v.* Société Générale d'Électricité	19 Ch. D. 246	183
West Ham Charities, In re	2 De G. & Sm. 218	216
West Hartlepool Ironworks Company, In re	Law Rep. 10 Ch. 618	264
Western *v.* McDermott	Law Rep. 2 Ch. 72	183, 741
Western of Canada Oil Lands and Works Company, In re	Law Rep. 17 Eq. 1	264
Weston *v.* James	1 Salk. 42	442

		PAGE
Wheatley *v.* Lane	1 Wm. Saund. 216 a	450
Wheeldon *v.* Burrows	12 Ch. D. 31	578
Wheelwright *v.* Walker	23 Ch. D. 752	563
White *v.* Bass	7 H. & N. 722	578
White's Trusts, Re	Joh. 656	246
Whiting to Loomes	14 Ch. D. 822; 17 Ch. D. 10	119
Whittaker *v.* Whittaker	4 Bro. C. C. 30	101
Wilde *v.* Gibson	1 H. L. C. 605	59
Wilkinson *v.* Duncan	23 Beav. 469	562, 648
Williams, Ex parte	Law Rep. 20 Eq. 743	679
Williamson *v.* Barbour	9 Ch. D. 529	533
Wilson *v.* Church	11 Ch. D. 576	311
——— *v.* Northampton and Banbury Junction Railway Company	Law Rep. 9 Ch. 279	578
——— *v.* West Hartlepool Railway Company	2 D. J. & S. 475	575
Wilson's Trusts, In re	Law Rep. 1 Eq. 247	640
Wiltshire Iron Company, In re	Law Rep. 3 Ch. 443	417
Winchester (Bishop of) *v.* Knight	1 P. Wms. 406	443
Winn *v.* Fenwick	11 Beav. 438	246
Wolley *v.* Jenkins	23 Beav. 53	238
Wood *v.* Wood	19 W. R. 1049	348
Wright *v.* Lambert	6 Ch. D. 649	562, 648
Wylde, In re	2 D. M. & G. 724	224

Y.

Yates *v.* Jack	Law Rep. 1 Ch. 295	284

Z.

Zetland (Earl of) *v.* Hislop	7 App. Cas. 427	186

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

BANKRUPTCY AND LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

BONNER *v.* GREAT WESTERN RAILWAY COMPANY.

C. A.
1883
V.-C. B.
April 13, 20.
C. A.
May 4.

[1883 B. 1663]

Railway Company—Easement over Railway—Adjoining Landowner—Interlocutory Injunction.

The Plaintiff was owner of a house some of the windows of which overlooked a piece of land belonging to a railway company and used as a goods yard of a station. When the house had been built sixteen years the company put up a screen opposite the Plaintiff's windows to prevent his acquiring an easement of light and air. The Plaintiff brought an action for injunction to restrain the company from interfering with his light and air; and moved for an interlocutory injunction till the hearing:—

Held (reversing the decision of *Bacon*, V.C.), that the Plaintiff had no equity to restrain the company from taking measures to prevent prescriptive rights from being acquired for windows looking upon their land. The injunction was therefore refused.

Norton v. *London and North Western Railway Company* (1) and *Swindon Waterworks Company* v. *Wilts and Berks Canal Navigation Company* (2) considered.

THE Plaintiff, *W. Bonner*, was the owner in fee simple and occupier of a piece of land at *Lawrence Hill*, in the county of *Gloucester*, on which an hotel was erected in June, 1867. The hotel was built close to the border of his land, where it abutted on a piece of land of the *Great Western Railway Company*, near the

(1) 9 Ch. D. 623. (2) Law Rep. 7 H. L. 697.

C. A. 1883 — BONNER v. GREAT WESTERN RAILWAY CO.

Lawrence Hill station, and three of the windows of the hotel overlooked this piece of land. The piece of land had not formerly been used by the company, except that it was occasionally let for travelling shows; but it had been recently brought into use as a station yard, and a line of rails had been made through it. The light and air coming to these windows had never been interfered with since 1867, but in November, 1882, the Defendants applied to the Plaintiff to pay a small yearly rent as an acknowledgment of tenancy of the easement of light and air; this being refused by the Plaintiff, the Defendants set up two poles with wooden screens opposite the Plaintiff's windows.

The Plaintiff commenced the present action in March, 1883, to restrain the company from interfering with the light and air coming to his windows, and for a mandatory injunction ordering them to remove the obstructions.

The motion came on for hearing before Vice-Chancellor *Bacon* on the 13th of April, 1883.

Marten, Q.C., and *Woodroffe*, for the Plaintiff, in support of the motion:—

The rights of landowners adjoining a line of railway are not to be prejudiced except so far as is required for the actual construction of the undertaking; and so far as the exercise of those rights does not interfere with the rights of the company and the rights of the public in the use of the railway, the free use and enjoyment of his land by the owner will not be restricted. A railway company can only use the land for the purpose for which they have acquired it, but not as against the adjoining owner to prevent his using his land for any purpose for which he could have used it if it had not been taken, and accordingly the company has no right to erect hoardings in order to prevent prescriptive rights being acquired for windows looking over the line of railway: *Norton* v. *London and North Western Railway Company* (1); *United Land Company* v. *Great Eastern Railway Company* (2); *Bostock* v. *North Staffordshire Railway Company* (3). The rights of ownership in the fee simple

(1) 9 Ch. D. 623.
(2) Law Rep. 17 Eq. 158; 10 Ch. 586.
(3) 5 De G. & Sm. 584; 4 E. & B. 798; 3 Sm. & Giff. 283.

conferred on public companies must be restricted and qualified by the terms of the legislative contract: *Blakemore* v. *Glamorganshire Canal Company* (1); *Attorney-General* v. *Great Northern Railway Company* (2). The obstruction complained of, which causes great inconvenience to the Plaintiff, has no connection with any works of the railway, but was put up for the mere purpose of preventing the Plaintiff from acquiring a prescriptive right to the easement. It can be at once removed without difficulty and without expense, and in such a case the Court will exercise the jurisdiction of granting an interlocutory injunction of a mandatory character in order to prevent irreparable injury or the summary interruption of a right claimed by the plaintiff and disputed by the defendant, until the question between the parties is decided: *Hervey* v. *Smith* (3); *London and North Western Railway Company* v. *Lancashire and Yorkshire Railway Company* (4).

[BACON, V.C.:—It is a simple question of law between you which has to be decided, and why not try it at once. Take down the screen in the meantime without prejudice to any right, and have the case heard as soon as you can bring it on.

Hemming, Q.C., on behalf of the Defendants, was anxious to have the cause advanced and to have a decision as soon as possible, but was not at liberty to consent to take down the screen.

BACON, V.C.:—Then go on.]

Hemming, Q.C., and *Medd*, for the Defendants:—

The case of *Norton* v. *London and North Western Railway Company* (5), when the judgment of the Court of Appeal (6) is looked at, is no authority whatever for the proposition that a railway company can be restrained from making any use of their land necessary for the protection of their rights as owners, and that they may not, like any other owners, set up a hoarding in order to prevent encroachments or the acquisition of easements adversely over their land. The point did not arise in that case, as the

(1) 1 My. & K. 154.
(2) 1 Dr. & Sm. 154.
(3) 1 K. & J. 389.
(4) Law Rep. 4 Eq. 174.
(5) 9 Ch. D. 623.
(6) 13 Ch. D. 268.

C. A. 1883 BONNER v. GREAT WESTERN RAILWAY CO.

Court of Appeal was satisfied, and so decided, that the hoarding was set up on land which belonged to the plaintiff and not to the company; and in this respect the order of Vice-Chancellor *Malins* was varied by limiting the injunction to setting up any hoarding on the land of the plaintiff and not restraining the company, as Vice-Chancellor *Malins* had done, from setting up a hoarding on their own land. The result of the decision, therefore, is to leave the question open, as it did not, in the opinion of the Court of Appeal, arise in that case. The other cases cited on behalf of the Plaintiff merely establish the proposition that companies have no right to use their lands for irregular purposes of profit outside their enterprise to the annoyance of their neighbours. If the Defendants cannot erect a hoarding on their own land, it will be impossible to prevent adjoining owners from establishing a right to light over the whole of the railway land, so as to render it impossible for the company at any future time to erect buildings necessary for their works, or to resell the land with all advantages properly belonging to it. There is not a shred of authority for the proposition that railway companies will be treated in this respect in any different way from other owners who acquire land. Their ownership is in no way fettered, and includes every right and incident of property which properly belongs to the land, and is in no way to be distinguished from that of the ordinary landowner: *Swindon Waterworks Company* v. *Wilts and Berks Canal Navigation Company* (1); *Earl of Sandwich* v. *Great Northern Railway Company* (2). We submit that there is no case whatever for granting a mandatory injunction.

BACON, V.C.:—

It is only because it is a mandatory injunction which is asked for that I have any reluctance to interfere. The Plaintiff has been in uninterrupted enjoyment of his property, a public-house, for sixteen years or thereabouts, and in enjoyment of the light and air for that period. His enjoyment of this light is suddenly interrupted by the Defendants for no useful purpose whatever, but merely for the purpose of trying the question of the legal right which they assert. That is the case which is presented to

(1) Law Rep. 7 H. L. 697. (2) 10 Ch. D. 707.

me on behalf of the Defendants. I suggested that the question, which may be said to be a nice one no doubt, required more deliberate discussion and consideration than I am prepared to bestow upon it now, to enable me to pronounce an opinion upon any other part of the case than this. If requiring the Defendants to take down their obstructions would put them to any inconvenience or injury or expense, other than the expense of removing them, I should hesitate very much to do it. But as the matter stands, the question being a nice one, and not yet decided, but requiring decision, I think that it can do no harm if I require the Defendants to take away that obstruction which prevents the Plaintiff from having the enjoyment which he has hitherto had—and which he may be entitled to have for all time to come—until the question can be decided. I invited the parties to come to some arrangement some time ago, to bring this question to a decision at the earliest possible opportunity and with as little expense as can be, and without doing any injury in the meantime, but that offer was declined by the Defendants. The Lords Justices, as Mr. *Hemming* said with perfect frankness, did not decide that question which Vice-Chancellor *Malins* did, but they treated it as if there were no doubt about it, and they came to the conclusion that the erection was on the plaintiff's land. At 13 Ch. D. p. 274, I read, "It was suggested that the plaintiff's lease did not give him the whole land up to the fence, but left a small strip unincluded. But if the defendants had, as we hold they had, ceased to be entitled to any part of the land, they have nothing to do with the plaintiff's title. His possessory right is sufficient against the trespasser." Then, a little lower down, "This hypothetical case was made the subject of much able and learned discussion both by the counsel and the Vice-Chancellor, viz., assuming that the hoarding was actually on the defendants' land, had they, having regard to their character and position as a public body incorporated for the sole purpose of making and using a railway, the same right of erecting a hoarding obstructing the access of light and air to the modern windows of the plaintiff, which an ordinary proprietor in fee simple would undoubtedly have? The Vice-Chancellor decided that they had not, and has granted an injunction which would prevent their erecting a similar hoarding if they

C. A. 1883 BONNER v. GREAT WESTERN RAILWAY CO. V.-C. B.

should be able, and minded to do so clearly within their own limits. They have not yet done so. The discussion involved a great number of questions. There was, first, the question, Has the company the same right to erect such a hoarding at its own will and pleasure as any other proprietor has, to do what he likes with his own? If not, has the company a right to do it, with the view and for the purpose of preventing the acquisition of an indefeasible easement? Has it that right *simpliciter* whenever a new window is opened, and as soon as it is opened, or has it that right only when it is possible, or only when it is reasonably probable, that the acquisition of such an indefeasible easement might or would interfere with the erection of a station, or other work, which might or would be possibly or probably required at some future time; and then, in connection with the next question, the discussion branched off into the problems following:—Would a user of lights for twenty years?" and so on; and then the Lords Justices came to the conclusion that the erection here was on the plaintiff's land. Then they go on to say: "We propose, therefore, to relieve the plaintiff (who has had sufficient litigation already) from the necessity of contesting further in this case the grave general questions of law, which have not yet arisen in fact, by limiting the injunction to the erection of any similar hoarding on his (the plaintiff's) land—that is to say, on any land outside the quickset fence of the railway."

It is quite true that those questions, which everybody must admit require and deserve discussion, are not touched by the observations of the Lords Justices in *Norton* v. *London and North Western Railway Company* (1). This case is relieved from some of the suggestions which have been made, for the railway company have not said that they have any present intention to erect sheds, or that the use which they may desire hereafter to make of this land is essential for the purposes of their railway. I am encumbered by no such fact. For the purposes only of trying the right they have erected these screens, which do at present obstruct the light which the Plaintiff formerly enjoyed.

Of course I am not bound, though I am very much guided, by what Vice-Chancellor *Malins* said, and by the cases which are there

(1) 13 Ch. D. 268.

referred to. The Court there did not hesitate to restrain the company, as there was very much like an inclination to interfere with the use of their land by the railway company for any purpose which can be said not to be within the intention of the Legislature—within what Lord *Eldon* called the parliamentary legislative contract by which their rights were limited. All that I have said shews that this case deserves further investigation. The Court interfered in those cases by mandatory injunction. Nobody can be more sensible than I am of the great danger there is in interfering by mandatory injunction, or more ready than I am to refuse to make any such order where I see that any irreparable injury or any great mischief may be done. But it is not suggested to me that the Defendants have any earthly use for this piece of land except for the purpose of sidings and a goods station. The injunction which I propose to grant will not interfere with their rights. I am bound, considering the circumstances and the facts which have been proved before me, to require that they shall take down these screens, so that until the question is decided they shall not continue to do the wrong which the Plaintiff reasonably complains of, and complains without contradiction or doubt on the part of the Defendants, and that they shall leave things *in statu quo* until the question shall have been decided between the parties. To that extent, therefore, I ought to grant an injunction in the terms asked. I am sorry that the parties did not see fit to adopt the suggestion which I threw out at an early stage of the case. I should have been better pleased if I could have seen some sincere desire on the part of the parties to have a proper decision, and to have that hearing come to without any circumstances or facts which would interfere with the decision of the question. I think, therefore, there must be an injunction, in the terms of the notice of motion, to restrain the Defendants from continuing the erection of those hoardings which are stated in the evidence and complained of by the Plaintiff. I do not wish it to be understood that I disregard the case of the *Swindon Waterworks Company* v. *Wilts and Berks Canal Navigation Company* (1), but in my opinion that was a case of a very different kind, and turned upon different considerations. There

(1) Law Rep. 7 H. L. 697.

C. A. 1883 BONNER v. GREAT WESTERN RAILWAY CO.

it was the case of a riparian owner, and the right to use water flowing through the land; it was a totally different case, and it has not the slightest effect on the rights of the parties in this case.

F. G. A. W.

C. A.

From this order the Defendants appealed. The appeal was heard on the 4th of May, 1883.

Hemming, Q.C., and *Medd*, for the Appellants.

Marten, Q.C., and *Woodroffe*, for the Plaintiff.

The same arguments were used and the same cases cited as in the Court below.

BAGGALLAY, L.J.:—

I am unable to take the same view of this case as was taken by the Vice-Chancellor. If a railway company are using their land, whether within their station arrangements or otherwise, for purposes not consistent with and not authorized by their Act of Parliament, then if the improper use of the land interferes with the right of an individual that individual may come on a case properly established to ask an injunction to restrain the railway company from such unlawful use of the land; and if there is the same unlawful use of the land, but the rights of private individuals are not interfered with, in such cases the Attorney-General may interpose and check the doing of acts which are *ultrà vires* of the company. But in the present case the person complaining has no rights at all. It is admitted that the windows through which the Plaintiff has derived light and air for a certain number of years past, have not been enjoyed for a sufficient length of time to give him a right to that light. It appears that for sixteen years he has had the enjoyment of these windows, and the view taken by the Vice-Chancellor was apparently this, that he had an accruing right to the enjoyment of this light, which, supposing there was no interruption on the part of the railway company, he might enjoy until the whole twenty years had expired, and that the Defendants ought to be restrained from interfering with the acquisi-

tion of the easement by the Plaintiff. But it seems to be contrary to every principle on which the Court acts in cases of this kind that a person who has no right should obtain an injunction to restrain a railway company or anybody else from doing that which will interfere with his acquiring a right, by reason of his being unmolested for a certain length of time. It appears to me that it would have been quite sufficient in this case to say that for this reason the Plaintiff is not entitled to the injunction which he asks. But the substantial question which is to be raised at the hearing of the cause, as I gather from the argument addressed to us, is this, namely, whether a railway company, having acquired land under its parliamentary powers for the purpose of its railway and for purposes connected with its railway, has the same rights of enjoyment of the property as a private individual would have who had acquired the property in the ordinary way. No doubt you may in particular cases, in which particular matters have been the subjects of complaint, find observations by learned Judges to the effect that railway companies do not possess the same unlimited powers of using their land as ordinary individuals would have; in other words, that they are not at liberty to use their land otherwise than for purposes consistent with the purposes of the Act of Parliament under which they are incorporated. But when it comes to a question as to the way in which land may be ordinarily enjoyed by a proprietor who derives his title under Acts of Parliament, and for purposes specified in the Acts of Parliament, you have the observations made by Lord *Cairns* and Lord *Hatherley* in the case of *Swindon Waterworks Company* v. *Wilts and Berks Canal Navigation Company* (1), which go very strongly to the effect of shewing that the provisions of such Acts are not to interfere with the ordinary rights which proprietors otherwise would have.

Certain observations made by Vice-Chancellor *Malins* in the case of *Norton* v. *London and North Western Railway* (2) have been very much relied upon. But, if that case is looked into, it will be seen that it was decided on a collateral point, namely, that the railway company had been guilty of trespass, and to

(1) Law Rep. 7 H. L. 697.

(2) 9 Ch. D. 623.

C. A. 1883 BONNER v. GREAT WESTERN RAILWAY CO. Baggallay, L.J.

the extent to which they had been guilty of trespass the injunction was continued, though it was limited to that portion of the complaint with respect to which there had been a trespass. However it is not at the present time that questions of that kind are to be discussed. *Primâ facie* a railway company have a right to use their land as they think fit, provided they are not using it for purposes inconsistent with their Act of Parliament. It is not suggested here that they are doing anything contrary to the purposes for which they were incorporated. The simple complaint is that a right, which the Plaintiff does not possess at the present time, may become a right. If there is any substantial question to be tried in this matter it must be tried at the hearing. At present there is no ground for the injunction being maintained, and it ought to be discharged.

LINDLEY, L.J.:—

I am of the same opinion. The Plaintiff comes here asking an injunction to restrain the Defendants from interfering with certain lights which he admits he has no title to. That appears to me to be the simple answer to the case quite apart from anything else.

FRY, L.J.:—

I entirely agree. I have no doubt of the jurisdiction of the Court to grant a mandatory injunction on interlocutory applications as well as the hearing; but I think that in the present case, in the first place, one must ask how do the *primâ facie* rights of the parties stand? The hoarding is erected by the Defendants on land confessedly theirs. Therefore there is a *primâ facie* right to erect that hoarding and to maintain it there. On the other hand, the Plaintiff has not enjoyed the lights which are interfered with by that hoarding for twenty years, and he therefore has no *primâ facie* title whatever to the access of light to that building. I then again ask myself, how does the balance of convenience stand? It appears to me that the taking down of the obstruction may seriously affect the rights of the Defendant company. I do not say it "would," but I say it "may." No form of admission which has been offered will really meet the case. On the other hand, leaving it up it will be but a comparatively slight

inconvenience or injury to the Plaintiff which can be amply recompensed in damages. Further than that, I desire to observe that in the present case it appears to me the Defendants have not acted arbitrarily or in an overbearing manner, for they offered to let the lights be enjoyed if the Plaintiff made a small payment, and they have only erected the hoarding for the *bonâ fide* protection of what they believe to be their rights.

Under these circumstances I see no ground on which the Court can grant a mandatory injunction to interfere with the possessory rights of the Defendants pending the determination of the various interesting questions which have been suggested.

Solicitors for Plaintiff: *Robinson, Preston, & Stow.*
Solicitor for Defendants: *R. R. Nelson.*

M. W.

In re MARSH AND EARL GRANVILLE.

[1882 M. 2655.]

Vendor and Purchaser—Misleading Condition of Sale—Limited Title—Voluntary Deed—Evidence—Recital in Deed more than Twenty Years old—Vendor and Purchaser Act, 1874 (37 & 38 *Vict. c.* 78), *s.* 2.

A contract entered into in 1882 for the sale of freehold estate provided that the title should commence "with an indenture dated the 18th of October, 1845," and made between persons whose names were mentioned, and that the earlier title should not be investigated or objected to. From the abstract of title delivered by the vendors to the purchaser it appeared that the deed of 1845 was a conveyance by a person, who purported to be the absolute owner, of freehold and leasehold property to trustees, on trust for himself for life, and after his death on trust to sell the property, and to hold the proceeds of sale on the trusts declared by a deed of even date. An express power was reserved to the grantor to revoke the trusts. The deed was a voluntary one, except for the consideration which resulted from the liability assumed by the trustees in respect of the leaseholds:—

Held, by *Fry*, J., and by the Court of Appeal, that, inasmuch as the fact that the deed of 1845 was a voluntary one would influence the purchaser in determining whether he would agree to accept a title commencing within forty years, the vendors ought to have stated in the condition of sale the nature of the deed; that the omission to state this rendered the condition a misleading one; and that the purchaser was not bound by the contract to accept a title commencing with that deed.

By a deed executed in 1858 (after the death of the settlor) the trustees conveyed the property to a purchaser for value. This deed contained a

C. A.
1883
In re MARSH AND EARL GRANVILLE.

recital of the deed of 1845, and a recital that the trustees "in pursuance of the trust for sale conferred on them" by that deed had caused the property to be put up for sale:—

Held, by *Fry*, J., that by virtue of sect. 2 of the *Vendor and Purchaser Act*, 1874, this recital, not being shewn to be inaccurate, was conclusive evidence that the deed of 1845 had not been revoked either by an exercise by the settlor of the power of revocation, or by a sale of the property by him for value during his lifetime.

ADJOURNED SUMMONS.

This was a summons under the *Vendor and Purchaser Act*, 1874.

On the 15th of March, 1882, an agreement was entered into between *Eliza M. A. Marsh*, widow, *Thomas Nesbitt*, and *Alexander Brodie*, of the one part, and Earl *Granville* of the other part, for the sale by the former to the latter of certain freehold and leasehold premises known as the *Ramridge* estate, in *Hampshire*. The 5th clause of the agreement provided that the title to the freehold portion of the estate should commence "with an indenture dated the 18th of October, 1845, and made between *Henry Gawler*, of the one part, and the Rev. *F. J. Courtenay* and *Edward Harrison* of the other part," and that "the earlier title, whether appearing by recital, covenant for production, or otherwise, or not appearing at all, shall not be investigated or objected to."

The vendors were the devisees in trust for sale under the will, dated the 21st of May, 1879, of *M. H. Marsh*, who died on the 26th of January, 1881.

From the abstract of title furnished by the vendors to the purchaser it appeared that the indenture of the 18th of October, 1845, with which the title commenced, was an absolute conveyance by *Gawler* to *Courtenay* and *Harrison* of certain freehold and leasehold properties (which included the properties comprised in the contract with Earl *Granville*) upon trust for *Gawler* during his life, and after his decease upon trust to sell the properties and to hold the proceeds of sale on the trusts thereof declared by an indenture of even date made between the same parties. The deed contained a proviso that it should be lawful for *Gawler* at any time thereafter by any deed or instrument in writing, executed and attested as therein mentioned, to revoke all or any of the

trusts, powers, provisoes, and declarations thereinbefore expressed and declared of and concerning the trust premises, and by the same or any other such deed or writing to declare, direct, and appoint any other trusts, powers, provisoes, and declarations of and concerning the trust premises as *Gawler* should think proper. This deed was made without any consideration, except such consideration as arose from the liability incurred by the trustees in relation to the leasehold part of the property assigned to them.

The subsequent title shewn by the abstract was as follows:—

Gawler died on the 15th of August, 1852.

By a deed dated the 4th of June, 1858, *Courtenay* and *Harrison* conveyed for value the freeholds comprised in the deed of the 18th of October, 1845, to *M. H. Marsh* in fee. This deed contained a recital of the deed of the 18th of October, 1845, and also the following recital:—"Whereas the said *F. J. Courtenay* and *Edward Harrison*, in pursuance of the trust for sale conferred on them by the hereinbefore recited indenture, caused the hereditaments hereinafter described to be put up for sale by public auction on the 24th of March last, and the said *M. H. Marsh* was declared to be the highest bidder and the purchaser at the said auction of the said premises for the price of £1715."

The will of *M. H. Marsh* and his death were also recited.

The purchaser's solicitors made (*inter alia*) the following requisitions on the title:—

(1.) "The conveyance of the 18th of October, 1845, is in part a settlement on the grantor, in part a voluntary conveyance to trustees for sale, with trusts of the sale moneys declared by a contemporaneous deed, and it contains a power to the grantor to revoke the trusts, which would include the trust for sale. Such a deed is not a good root of title, and a good forty years' title must be deduced.

(2.) "What evidence was furnished to the vendors' testator on purchasing, or can the vendors now furnish or obtain proof, (1) that the voluntary conveyance of the 18th of October, 1845, was not avoided by a subsequent conveyance for value; (2) was not revoked under the power of revocation?"

In answer to the first requisition the vendors' solicitors relied on the 5th clause of the contract.

C. A. 1883 *In re* MARSH AND EARL GRANVILLE.

In answer to the second requisition a statutory declaration was made by *John Smith*, a solicitor at *Andover*, in which he stated that he knew and was well acquainted with *Gawler* for ten years and upwards prior to his death, and that his late firm of *Earle & Smith* acted as *Gawler's* solicitors from the 1st of February, 1847, until his death; that the deed of the 18th of October, 1845, was prepared in the office of Messrs. *Earle & Everett* (the predecessors in business of *Earle & Smith*) for *Gawler*; that he verily believed that the freehold land comprised in that deed was the property of and in the possession of *Gawler* for some years previously to the date of that deed, and from that date up to the date of his death. *Smith* added that he never heard of any revocation of the trusts of that deed, or of any sale by *Gawler* of the freehold land for money, as he believed he must have done had there been any such revocation or sale.

It was admitted that the possession of the land had been in accordance with the title shewn by the abstract.

The purchaser insisting on his requisitions, the summons was taken out by the vendors, asking a declaration that the purchaser was precluded by the contract and the provisions of the *Vendor and Purchaser Act*, 1874, or otherwise, from making or insisting on his objections or requisitions on title Nos. 1 and 2 respectively, and that the purchaser might be ordered to pay the costs of the application.

The summons came on for hearing before Mr. Justice *Fry* on the 18th of November, 1882.

H. A. Giffard, Q.C., and *N. R. Smart*, for the summons:—

It has never yet been laid down that a voluntary conveyance is not a good root of title. The text-books shew that a settlement is as good a root of title as any other deed, and they draw no distinction between an ante-nuptial and a post-nuptial settlement: *Preston* on Abstracts (1); *Hayes'* Conveyancing (2); *Bythewood* and *Jarman's* Conveyancing (3); *Dart's* Vendors and Purchasers (4). The condition only shortens the length of the title which is to be shewn; any document which would

(1) 2nd Ed. vol. i. pp. 16, 17.
(2) 5th Ed. vol. i. pp. 570, 572.
(3) 3rd Ed. vol. i., pp. 65, 67.
(4) 5th Ed. vol. i. p. 296.

have been a good root of title on an open contract is equally good in the present case.

[FRY, J.:—Is not the objection rather that, when you limit the purchaser as to the length of title which he is to have, you ought to tell him if you intend to start with a voluntary deed? A vendor should give full information to the purchaser; he ought to state that which, if it is not stated, makes that which he does state ambiguous or misleading: *In re Banister* (1).]

There is nothing unfair in this condition, nothing to mislead an ignorant person.

Then the deed of 1845 was not a voluntary deed, for it comprised some leaseholds in respect of which the trustees came under liabilities. That is sufficient consideration to prevent the deed from being a voluntary one: *Price* v. *Jenkins* (2).

And, if it is a voluntary deed, it could only be rendered void by reason of a subsequent sale by the settlor to a purchaser for value. For this purpose the title antecedent to the deed of 1845 is immaterial; it can throw no light on the question whether the vendor sold the property for value after the date of the voluntary deed. No one could avoid the deed except a purchaser from him during his lifetime; his heir or devisee could not do so.

[FRY, J.:—The objection seems to be that on a voluntary conveyance the prior title is not likely to have been investigated. You do not look a gift horse in the mouth.]

As to the second requisition, sufficient evidence that the deed was never revoked by *Gawler*, and that he never afterwards sold the property for value, is supplied by the declaration of Mr. *Smith*. And, moreover, under sect. 2 of the *Vendor and Purchaser Act*, 1874, the recital in the deed of 1858, which is more than twenty years old, that the sale to *Marsh* was made in pursuance of the trust for sale created by the deed of 1845, not being shewn to be inaccurate, is sufficient evidence of the fact there stated, and prevents the purchaser from saying that the trust was not then subsisting.

Cookson, Q.C., and *W. E. Mozley*, for the purchaser:—

The parties are in the same position as if this had been a

(1) 12 Ch. D. 131. (2) 5 Ch. D. 619.

C. A. 1883 ~~ *In re* MARSH AND EARL GRANVILLE.

reference as to title in an action for the specific performance of the contract: *In re Burroughs* (1).

The statement in the condition is not a fair representation of the deed of 1845: *In re Banister* (2). The deed is a defeasible conveyance, and this ought to have been stated. And the authority of *Price* v. *Jenkins* (3) has been shaken by the Court of Appeal in the recent case of *In re Ridler* (4). At any rate, the trusts could be revoked under the power, and the condition is misleading in not stating this. The passage quoted from *Preston* on Abstracts is in our favour: see also *Dart's* Vendors and Purchasers (5). If the deed of 1845 would have been a good root of title on an open contract, it does not follow that it is so when there is a stipulation for a limited title: *Phillips* v. *Caldcleugh* (6).

As to the second requisition, the vendors have not discharged the burden of proving that the deed of 1845 has not been revoked or avoided. The only evidence of this is the declaration of *Smith*, and the fact that no other claimant to the property has yet come forward. The recital in the deed of 1858 is consistent with the trust not being then in existence.

The Court will not force a doubtful title on a purchaser: *Pyrke* v. *Waddingham* (7); *Mullings* v. *Trinder* (8); *Lowes* v. *Lush* (9); *Freer* v. *Hesse* (10); *Clarke* v. *Willott* (11).

Giffard, in reply:—

It would have made no difference to the purchaser if all the facts had been stated. The condition is perfectly fair. If the deed of 1845 had been a reconveyance of an old mortgage, the title would not have been investigated any more than in the case of a voluntary settlement, and so also if it had been a settlement of a family estate on a marriage. In either case the deed would have been a good root of title, and would have been correctly described simply as an indenture. A purchaser is not entitled to assume that an "indenture" is necessarily a purchase

(1) 5 Ch. D. 601.
(2) 12 Ch. D. 131.
(3) 5 Ch. D. 619.
(4) 22 Ch. D. 74.
(5) 5th Ed. vol. i. p. 152.
(6) Law Rep. 4 Q. B. 159.
(7) 10 Hare, 1.
(8) Law Rep. 10 Eq. 449, 454.
(9) 14 Ves. 547.
(10) 4 D. M. & G. 495.
(11) Law Rep. 7 Ex. 313.

17 Jun 703

deed. *Price* v. *Jenkins* (1) has not been overruled. It applies notwithstanding the power of revocation, which is only a power to revoke the trusts, and does not affect the conveyance of the legal estate.

The recital in the deed of 1858 is, under sect. 2 of the *Vendor and Purchaser Act*, 1874, sufficient evidence that the trusts of the deed of 1845 had not been revoked during the life of the settlor.

Any other claimant of the property would have been statute-barred long ago. In every case, of course, there are vague possibilities of existing limitations, but a vendor is not bound to provide against them.

FRY, J. (after stating the facts and the fifth condition of sale), continued:—

The question which arises is this: Is the description given of the indenture of 1845 in the fifth condition of sale sufficient to enable the vendors to force the title upon Earl *Granville* without shewing a forty years' title? I would observe that the form of the requisition on title, and the form of the summons, to some extent suggest that, if the condition is not binding, the purchaser is entitled to a forty years' title. That is not, in my view, strictly correct. The right of the purchaser is to revoke or to rescind the contract, or to refuse to complete, but he may refuse to complete except on the condition which he may impose, namely, that a forty years' title shall be shewn. That is an option which he may offer, not his right, and if the vendor decline to disclose it the purchaser has no right to call for the forty years' title.

The principles applicable to the decision of the question appear to me to be not in dispute. According to the view which I take, a vendor who desires to limit the rights of a purchaser must do so by explicit and plain conditions, and he must tell the truth, and all the truth, which is relevant to the matter in hand.

The reason for this is twofold. In the first place, as I observed in *In re Banister* (2), the vendor knows the condition of the title, and the purchaser does not, and that puts upon the vendor the burden of being very explicit in his description. In the next

(1) 5 Ch. D. 619. (2) 12 Ch. D. 131.

C. A. 1883 *In re* MARSH AND EARL GRANVILLE. Fry, J.

place, the descriptions in the contract, or conditions of sale, are the only materials which the purchaser has for deliberating upon before he enters into the purchase. He knows as much as is told him and no more, and, therefore, he ought to be put into possession of everything, so far as it is touched upon by the conditions of sale, which is likely to influence his mind in determining whether he will buy or not.

Now the deed of 1845 was a peculiar one in this sense; it was not an ordinary settlement or an ordinary conveyance upon a sale, but, if not a voluntary deed, it was founded on consideration only because some leaseholds were included in it, and, under the doctrine of *Price* v. *Jenkins* (1) that fact may prevent its being treated as an absolutely voluntary conveyance. But, subject to that, it was voluntary, and it reserved to the settlor an express power of revoking the trusts thereby created. It was, therefore, not a dealing between parties at arms' length; it was in substance, though not perhaps actually in form, a voluntary conveyance. It was capable of revocation under the power, and it was possibly, according to what I am told has been the intimation of the opinion of some of the Judges of the Court of Appeal since *Price* v. *Jenkins*, revocable under the Statute of *Elizabeth*.

It appears to me that that placed on the vendors the burden of disclosing something more than they did disclose. I think they ought to have intimated the general nature of the instrument, because it is evident that a person who was contemplating purchasing the property would be more or less influenced by the nature of that instrument. If it had been a dealing between persons at arms' length there would have been more security in taking the short title than there is under the actual circumstances of the case.

Then it is contended by the learned counsel for the vendors that, under the particular circumstances of the case, the matter is immaterial, because the recital in the deed of 1858 precludes the purchaser from raising any question as to revocation of the deed, and that therefore it is just as good as any other conveyance. But that very circumstance shews very strongly that the purchaser ought to have been put in possession of the fact, in order

(1) 5 Ch. D. 619.

that he might judge whether he would submit to be bound by such a recital if it should appear. In other words, I think enough was not told him. Therefore, although there was no intention to deceive, the description is not in the view of this Court adequate or fair.

Then arises the second question, viz., how far the purchaser is at liberty to insist upon better evidence that there has been no revocation of the deed of 1845, and no avoidance of it by a subsequent conveyance for value. It appears to me that that requisition has been adequately answered. There is the declaration by Mr. *Smith*, who was either the solicitor, or employed in the office of the solicitor, of Mr. *Gawler*, during the whole period from a date antecedent to the voluntary conveyance down to his death, and he says that he knows nothing of any sale for valuable consideration or of any revocation. And it is admitted that Mr. *Gawler* continued to occupy the property after the voluntary conveyance; that after his death his trustees occupied it or were in possession of it; that on their sale to Mr. *Marsh* he entered into possession, that he continued in possession down to the time of his death and that his trustees are now in possession. There has, therefore, been for a very long period of time a possession in accordance with the devolution of title shewn, and there is nothing whatever to throw any doubt upon the suggestion that there has been no revocation made and no sale for value entered into. It is almost inconceivable that a sale for value should have been made, and that the purchaser under it should not have taken possession, unless indeed it had been of a very extraordinary kind. But, further than that, it appears to me that the requisition is precluded by sect. 2 of the *Vendor and Purchaser Act*, 1874. I think, therefore, that the purchaser must succeed upon the first, and fail upon the second of his objections. I shall declare that the purchaser is not precluded by the contract from insisting upon his first objection, but that he is precluded from insisting upon the second, and, considering the circumstances, I think there ought to be no costs of the summons.

It must be plainly understood that what I declare is this, not that the Earl is entitled to a forty years' title, but that the vendors cannot compel him to complete unless they yield to his

C. A. 1883 *In re* MARSH AND EARL GRANVILLE. C. A.

demand for a forty years' title. This had better be expressed in the declaration.

W. L. C.

The vendors appealed from the decision on the first objection, and the purchaser from the decision on the second objection. The appeals came on to be heard on the 14th of June, 1883.

H. A. Giffard, Q.C., and *N. R. Smart*, for the Appellants in the first appeal:—

The first requisition raised two objections: that the deed was not a good root of title, and that the vendors must shew a forty years' title, or the purchaser would not complete. We say that a voluntary conveyance is a good root of title. A deed executing a power is not; the title must go back to the deed creating the power. A general devise is not; seisin must be shewn. A disentailing assurance is not; the creation of the estate tail must be shewn, but no case decides that a voluntary conveyance is not. It is only in cases where the effect of the instrument depends on something else that it is not a good root of title, and no case goes further: *Davidson's* Conveyancing (1); *Dart's* Vendors and Purchasers (2).

[COTTON, L.J.:—That does not seem to me to be the point. The question is, whether a voluntary conveyance not expressed to be such can reasonably be made the subject of a condition of this kind. A purchaser for value is presumed to have investigated the title; a voluntary grantee never does.]

The cases on conditions as to root of title range themselves into two classes: 1. where the purchaser is only precluded from calling upon the vendor for an earlier title; 2. where the purchaser is precluded from taking objections if he can find them out *aliunde*, and such a condition is valid: *Hume* v. *Bentley* (3). If it were alleged that the purchaser understood that this deed was a purchase deed the case would stand differently; but he does not say so. Mr. Justice *Fry* relied much on *In re Banister* (4); but in that case the vendor bound the purchaser to assume a state of

(1) 4th Ed. vol. i. p. 541.
(2) 5th Ed. p. 295.
(3) 5 De G. & Sm. 520.
(4) 12 Ch. D. 131.

things which the vendor knew to be untrue. It was a case of bad faith. A condition is fair if it contains no misleading description, and there is nothing here to mislead, no representation being made as to the nature of the deed. Moreover the conveyance was not voluntary, for the grantee came under liability for the rent of the leaseholds, which are extensive: *Price* v. *Jenkins* (1).

[BOWEN, L.J.:—Might not the deed be voluntary as to the freeholds, though not so as to leaseholds? Would it not open a door to fraud to hold otherwise?]

There could be no opportunity for fraud, as the rule does not apply under the statute 13 Eliz. c. 5: *In re Ridler* (2).

[COTTON, L.J.:—To my mind it is not important whether the deed was strictly voluntary or not. I think the question is, whether it was a deed of such a nature that in the ordinary course of things the grantee would investigate the title.]

The condition is fair; its only effect is to shorten the period for which a title is to be shewn. It amounts to a stipulation that the vendors will only shew a title for thirty-six years instead of one for forty, and whatever would have been a good root of title if it had been forty years old is made a good root of title if thirty-six years old. There has been undisputed possession for twenty-three years from the sale, and the observation of the Master of the Rolls in *Camberwell and South London Building Society* v. *Holloway* (3) applies. The title under the settlement could not be defeated except by revocation or subsequent sale for value; and the evidence is sufficient that it was not defeated in either way. Again, the stipulation is not to be treated in the same way as if it had been a condition of sale. This was a contract settled between the parties, and if the purchaser's solicitors thought the nature of the deed material they could have inquired as to it. This decision, if supported, will revolutionize the practice of conveyancers. The practice was when a deed within the forty years was made a root of title, and it was a purchase deed or mortgage, to state that fact because it made the conditions appear less stringent, and if it was not a deed the nature of which told in favour of the title then to

(1) 5 Ch. D. 619.
(2) 22 Ch. D. 74.
(3) 13 Ch. D. 754, 763.

C. A. 1883 *In re* MARSH AND EARL GRANVILLE.

say nothing about its nature; but Mr. *Wolstenholme's* Conveyancing Acts, 1881–1882 (1) adopts the decision of Mr. Justice *Fry* in this case, and says that now if a conveyance is voluntary, that fact must be stated in the condition. How far is this to be carried? Is a vendor who bought under conditions of sale precluding him from calling for a marketable title bound to state that fact if he makes his purchase-deed the root of title?

Cookson, Q.C., and *W. E. Mozley*, for the purchaser, were not called upon.

BAGGALLAY, L.J.:—

The grounds upon which I am prepared to hold that this appeal should be dismissed may be expressed in very few words. On the 15th of March, 1882, a contract was entered into by the executors and trustees of the will of a Mr. *Marsh* for the sale to Lord *Granville* of a property consisting in part of freehold and in part of leasehold. At the time that contract was entered into the *Vendor and Purchaser Act of* 1874, was in force, by the 1st section of which it is provided that, subject to any stipulation to the contrary in the contract, forty years shall be substituted as the period for the commencement of the title in place of sixty years. In this case, instead of taking the forty years provided for by the Act, a stipulation to the contrary is inserted in the contract. Any stipulation inserted in a contract for the purpose of limiting the period for which a title shall be shewn must give a perfectly fair description of the nature of that which is to form the root of title; and if the root of title is an instrument, whether a deed of conveyance, commonly so called, or a deed of settlement, or a will, or whatever it may be, its nature must, if that stipulation is to have effect, be fairly and clearly stated.

Now the stipulation in this contract is, that the title shall commence as to the freehold portion of the property with an indenture dated the 18th of October, 1845, made between Mr. *Gawler* of the one part, and Mr. *Courtenay* and Mr. *Harrison* of the other part, and that "the earlier title, whether appearing by recital, covenant for production or otherwise or not appearing at

(1) 3rd Ed. p. 191.

all, shall not be investigated or objected to." When the title came to be investigated, that which is so described appeared to have been in part a settlement on the grantor, and in part a voluntary conveyance to trustees, in trust for sale; and it contains a power to the grantor to revoke the trusts, which would include the trusts for sale. When the requisition for an earlier title was made, the vendors were unwilling to comply with it. They said you are precluded by the stipulation in the contract. Thereupon under the Act of 1874 the opinion of the Judge was taken as to the validity of the requisition so made, and Mr. Justice *Fry*, before whom the matter came, held that the stipulation was not expressed in those clear and explicit terms in which it ought to be expressed if the purchaser was to be bound by it. I have come to the same conclusion.

If the stipulation had provided that the title should commence with an indenture dated the 18th of October, 1845, which was a voluntary settlement, stating its effect, and mentioning the power of revocation, it would have been for the consideration of the purchaser whether he would submit to be bound by a stipulation of that kind. As the stipulation stands he, *primâ facie*, would suppose that the indenture referred to was a conveyance to a purchaser for value, the inference from which would be that at that time the title was investigated and approved of. I do not, however, rest my judgment on the ground that that would be the idea conveyed to the purchaser in the present case, but on the ground that he ought to have had an opportunity of deciding whether he would accept a deed of this description as a root of title when the title was to commence within the statutory period. There was not in my opinion such a full and explicit description of the deed given as he was entitled to, and therefore I think the decision of Mr. Justice *Fry* is right.

COTTON, L.J.:—

I am of the same opinion. It is necessary to state how the question comes before us. There was a contract between the Appellants and the Respondent which contained a stipulation limiting the time from which the title was to commence. Then the purchaser made a requisition asking for an earlier title. The

C. A. 1883 *In re* MARSH AND EARL GRANVILLE. Cotton, L.J.

vendors replied by referring to the stipulation. The purchaser says "that is not a sufficient answer to my requisition, the stipulation is misleading, and I am not bound by it." The vendors then come to the Court and ask for a declaration that by the stipulation in the contract the purchaser is precluded from insisting on the requisition he has made. It is really, therefore, a question whether, if there were an action by the vendors for specific performance, the Court ought, according to well-known principles, to compel the purchaser to complete with no other title than that which the contract says shall be the title.

For the purpose of preventing any mistake as to the reasons of my judgment I expressly state that in my opinion the point which we have to decide has nothing to do with the question whether a voluntary conveyance is or is not a good root of title. A good title must be shewn now for forty years, and in my opinion a voluntary deed, if it is sufficiently old and satisfies the other conditions requisite to make a deed a good root of title, is a good root of title. The question we have to consider is, whether the purchaser is bound by this particular condition. I think that the principle is this, that the Court will not compel a purchaser to take an estate with less than the ordinary title which the law gives him unless the stipulation on which the vendor relies for the purpose of excluding what would otherwise be the purchaser's legal right is fair and explicit. I think that the test of its being fair and explicit is whether it discloses all facts within the knowledge of the vendor which are material to enable the purchaser to determine whether or not he will buy the property subject to the stipulation limiting his right to the ordinary length of title.

It was argued that this is not the ordinary case of a condition of sale, but it is a case of contract between the parties, and that the two cases do not stand on the same footing, for that the purchaser, if he thought the nature of the deed material, had an opportunity of asking about it before he signed the contract. I think that argument cannot prevail. In my opinion the condition in the contract must be dealt with just as if it was a condition of sale under which an estate is sold by auction. A purchaser at an auction might ask the same question. The

vendor says, this is the contract shewing the terms on which I will sell to you, and the purchaser, just as a man does who bids at an auction, says, I will buy on those conditions.

Is then the stipulation one by which the purchaser ought to be bound? It is true that the time during which the title is to be shewn is not limited to any great extent, but I do not think that material. Here a stipulation binding the purchaser not to require an ordinary legal title proposes that a certain deed shall be the root of the title. In my opinion it is most material for enabling a purchaser to decide whether he will enter into such a contract that he should know whether the deed was upon a transaction in which ordinarily there would be an investigation of the title, and if the vendor knows that the deed was on a transaction where there would be no investigation, and does not disclose that fact, the purchaser, in my opinion, has a right to complain that this fact was not disclosed by the contract. All that we decide in the present case, and all that Mr. Justice *Fry* decided is, that the vendors knowing the nature of this deed, and not disclosing it, cannot by force of the stipulations in the contract claim specific performance without shewing a title extending over the statutory period. In my opinion the decision was right, and the appeal must fail.

BOWEN, L.J.:—

I am of the same opinion, and will only add one word with regard to the argument upon the case of *Price* v. *Jenkins* (1), although it is not necessary to decide the point. *Price* v. *Jenkins* was a case in which there was an assignment of leasehold property with a liability to perform certain covenants attached to it, and it was held that the assignment was therefore a conveyance for valuable consideration. It does not follow that if there is in the same deed a conveyance of freeholds as well as an assignment of leaseholds, the decision in *Price* v. *Jenkins* establishes that the liability to the covenants in the leaseholds is sufficient to support the concurrent conveyance of freeholds as being a conveyance for valuable consideration. As at present advised, I think that to hold so would be to be imposed on by a piece of sealing-wax. We often find that what is in form one contract

(1) 5 Ch. D. 619.

C. A. 1883 *In re* MARSH AND EARL GRANVILLE.

contains several perfectly separable contracts, and to hold that a conveyance of valuable freeholds can be made a conveyance for valuable consideration by throwing into the same piece of parchment a little bit of leasehold would be taking a most unfair advantage of a decision which was never meant to decide anything of the kind.

The purchaser's appeal stood over, with liberty to apply to have it put in the paper again when it appeared what course was taken as to furnishing a further title.

Solicitor for Vendors: *A. J. Murray.*
Solicitors for Purchaser: *R. M. & F. Lowe.*

H. C. J.

C. A. 1883 *June* 21.

Ex parte ARNAL. *In re* WITTON.

Leasehold Interest of Bankrupt—Disclaimer by Trustee—Leave of Court—Terms to be imposed on Trustee—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71) *s.* 23 *—Bankruptcy Rules*, 1871, *r.* 28.

In determining whether, on giving leave to the trustee in a bankruptcy to disclaim a lease of the bankrupt, the trustee should be ordered to pay compensation to the landlord in respect of his occupation of the leasehold premises, the Court will have regard not merely to the question whether the occupation has actually produced a profit to the bankrupt's estate, but also to the question whether the possession was retained by the trustee with a view to obtaining such a profit.

The rule as laid down by *Cotton*, L.J., in *Ex parte Isherwood* (1), adopted in preference to that expressed by *Jessel*, M.R., in *Ex parte Izard* (2).

The imposing of conditions on the trustee is, however, a matter of judicial discretion, and the Court of Appeal will not readily interfere with the exercise of discretion by the Judge of first instance.

The Court ordered compensation to be paid by the trustee in a bankruptcy as a condition of giving him leave to disclaim the lease of the bankrupt's place of business, although during part of the time during which the trustee had been in occupation a bailiff had been in possession of the bankrupt's goods under a distress for rent, and the landlord had been allowed to place bills on the premises stating that they were to be let, and that application for that purpose was to be made to him.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

(1) 22 Ch. D. 384. (2) 23 Ch. D. 115.

Henry Witton, a pianoforte manufacturer, filed a liquidation petition on the 13th of December, 1882. At the first meeting of the creditors on the 3rd of January, 1883, the creditors resolved on a liquidation by arrangement, and appointed a trustee.

The debtor occupied the premises in which he carried on his business under a lease from *L. C. Arnal*, dated the 22nd of August, 1881, for a term of twenty-one years from the 25th of December, 1880, at a yearly rent of £160, payable quarterly. At the time when the petition was filed the quarter's rent (£40) due at Michaelmas, 1882, was unpaid, and there was also unpaid a sum of £10 of the previous quarter's rent. Soon after the filing of the petition the landlord distrained for the £50, and on the 10th of January, 1883, the trustee paid out the distress. The bailiff had been in possession for twenty-three days. He continued in possession under a distress for the Christmas rent, and on the 24th of January the trustee paid out this distress, and the bailiff withdrew. After this the business was carried on by the debtor during part of February as the agent of the trustee. Negotiations took place between the landlord and the trustee for a surrender of the lease, but no agreement was come to. The landlord had been allowed by the trustee to put up bills on the premises in January, stating that they were to be let, and that application was to be made to *Arnal*. The trustee retained possession of the premises, and kept some of the debtor's goods there until about the end of the third week in February, 1883, and on the 6th of March he tendered the key of the premises to the landlord, who declined to receive it. The trustee afterwards applied to the Court for leave to disclaim the lease. He deposed that, with the exception of a few trifling sales, no pecuniary or other advantage had accrued to the debtor's estate by means of the occupation of the premises since the 25th of December, 1882. The Registrar on the 3rd of April, 1883, gave the trustee unconditional leave to disclaim the lease. The landlord appealed.

Cooper Willis, Q.C., and *Forbes Lankester*, for the Appellant:—

The landlord is entitled to compensation for the trustee's occupation of the property by keeping the debtor's goods there: *Ex parte Ladbury* (1); *Ex parte Izard* (2).

(1) 17 Ch. D. 532. (2) 23 Ch. D. 115.

C. A.
1883
Ex parte ARNAL.
In re WITTON.

[BAGGALLAY, L.J., referred to *Ex parte Isherwood* (1).

LINDLEY, L.J.:—In *Ex parte Izard* (2), £20 was given.]

We ask for £35, that is, £28, the proportion of the rent from the date of the trustee's appointment until he gave up the key, and £7 premium for fire insurance, which the debtor had agreed to pay as an addition to the rent, and which ought to have been paid before the petition was filed. The trustee ought to pay a fair rent for the period of his occupation. The carrying on of the business was a benefit to the estate.

Wyatt Hart (*Nicholson* with him), for the trustee:—

The trustee's occupation had not produced any benefit to the estate; the landlord is bound to shew that: *Ex parte Izard.*

[BAGGALLAY, L.J.:—You warehoused your goods on the premises.]

The landlord's own acts in levying the distresses prevented the trustee from going out of possession. He required time to raise the money in order to prevent a forced sale of the goods. But the landlord benefited by having the security of the goods. In truth, he was in joint occupation by means of the possession of the bailiff, and the bills advertising the property as to let were put up for his benefit.

[BAGGALLAY, L.J.:—The landlord in levying the distresses only exercised his legal right.

COTTON, L.J.:—The trustee derived a benefit by the goods not being sold under the distresses and by their being warehoused.]

The landlord might have called on the trustee to disclaim under sect. 24. But no real benefit has been derived by the debtor's estate from the occupation.

[COTTON, L.J.:—I think that in *Ex parte Isherwood* the late Master of the Rolls intended to say that there must either have been a benefit accrued to the estate from the trustee's occupation, or that the possession must have been retained with the view of obtaining a benefit.

BAGGALLAY, L.J.:—It seems to me that in *Ex parte Izard* the Master of the Rolls rather limited the general effect of the decision

(1) 22 Ch. D. 384. (2) 23 Ch. D. 115

in *Ex parte Isherwood* (1). I adopt what was said by Lord Justice *Cotton* in that case. But in *Ex parte Izard* (2) it was not necessary to go beyond the case of actual profit, because the Master of the Rolls was of opinion there had been an actual profit.]

In the present case the trustee had not an exclusive possession as in *Ex parte Izard.*

At any rate under rule 28 the Court is exercising a discretion, and the Court of Appeal will not readily interfere with the Registrar's decision. It will not interfere unless he has acted on an erroneous principle.

[BAGGALLAY, L.J.:—I think the Registrar was under a misapprehension as to the effect of the decision in *Ex parte Izard.* It had not been fully reported when the present case was heard.]

Willis, in reply:—

The trustee was not ready to go out at any moment, and we could not eject him.

BAGGALLAY, L.J.:—

Until the decision in *Ex parte Ladbury* (3) the general impression was that rule 28 did not apply as between the lessor and the trustee. But a different view was adopted in *Ex parte Ladbury,* and that has since been followed in *Ex parte Isherwood* and *Ex parte Izard.* The latter case had not been fully reported when the Registrar gave his decision in the present case. The principles on which the Court will act in imposing terms on a trustee when giving him leave to disclaim a lease were very fully explained in those cases, and I desire to refer to them now only for the purpose of saying that I adopt the larger view which was expressed by Lord Justice *Cotton* in *Ex parte Isherwood,* rather than the more limited view which was expressed by Sir *George Jessel,* M.R., in *Ex parte Izard.* In the latter case it was only necessary that the Master of the Rolls should take the more limited view, because he was of opinion that the trustee's occupation had actually resulted in a profit to the bankrupt's estate.

(1) 22 Ch. D. 384. (2) 23 Ch. D. 115.
(3) 17 Ch. D. 532.

C. A. 1883 *Ex parte* ARNAL. *In re* WITTON. Baggallay, L.J.

Lord Justice *Cotton* in *Ex parte Isherwood* expressed his view thus (1): "In determining what he (the trustee) ought to pay, regard must be had to two things, whether the occupation has either in fact produced a benefit to the bankrupt's estate, or was contemplated as likely to produce a benefit, and the circumstance that, in consequence of the disclaimer relating back to the date of the adjudication, the owner of the estate is in the interval between the adjudication and the execution of the disclaimer in this position, that he has been lawfully kept out of the use of his property by virtue of the operation of the lease, and cannot after the disclaimer bring any action against the person who without his consent has been in the occupation of the property. These two things ought to be taken into consideration." The present case appears to be a very trumpery one, and I agree that it is not desirable to encourage appeals in such cases. Had not the Registrar been under a misapprehension as to the decision in *Ex parte Izard* (2) I should have felt disposed to dismiss the appeal on this ground. But the Appellant was within his rights in appealing, and under the circumstances I think £20 is a proper sum to award him. To mark, however, our disapprobation of such appeals I think that we ought to give no costs of the appeal.

COTTON, L.J.:—

I agree.

LINDLEY, L.J.:—

I think £20 is a fair and reasonable sum under the circumstances.

Liberty to disclaim was given conditionally on the payment of £20 by the trustee to the landlord.

Solicitors for Landlord: *Cheston & Sons.*
Solicitors for Trustee: *Gowing & Co.*

(1) 22 Ch. D. 395. (2) 23 Ch. D. 115.

W. L. C.

Ex parte LOVERING. *In re* MURRELL.

C. A. 1883 June 21.

Reputed Ownership—Order and Disposition—Articles not connected with Business—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 15, *sub-s.* 5.

When a trader is in possession at his place of business of articles not in their nature connected with his business, and the trustee in his bankruptcy claims the articles on the ground that the bankrupt was the reputed owner of them, much stronger evidence will be required to prove the reputed ownership than in the case of articles connected with the business, the inference from the nature of the articles being that they are not connected with the business.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

William Murrell and his two sons, *Stanley Murrell* and *Herbert Murrell*, carried on together in partnership the business of woollen manufacturers, under the firm of *Williams & Murrell*. The business had formerly been carried on by the father and a partner named *Williams* under the same firm. On the 8th of June, 1882, the father and the sons filed a liquidation petition. At the commencement of the liquidation there were in the warehouse and the counting-house of the firm a number of pictures, and the question arose whether these pictures formed part of the joint estate of the firm, or whether they were separate estate of the father. The trustees of the joint estate claimed them as being in fact joint estate, or, if they were in fact the separate property of the father, as having been in the order and disposition of the firm as reputed owners. On the application of one of the separate creditors the Registrar made an order declaring that the pictures belonged to and formed part of the separate estate of the father. The trustees of the joint estate appealed.

On behalf of the trustees of the joint estate *F. P. Rouch*, who was the *London* representative of *Mark Oldroyd & Sons*, cloth manufacturers at *Dewsbury*, who were creditors of the debtors' firm, deposed: "I frequently visited the debtors' place of business, and for the last six years, or about that period, I noticed that a large quantity of pictures were in the warehouse. On several occasions *William Murrell* referred to the said pictures and the amount of

C. A. 1883 *Ex parte* LOVERING. *In re* MURRELL.

money that he said he had invested in them, and, speaking to me on the subject of the account of my principals against him, he referred to the said pictures and his stock of woollen goods as property belonging to him. In consequence of the statements made to me by *William Murrell* I informed my principals that there was a large sum of money locked up in pictures which would realise a large amount when sold, and by that means *William Murrell* obtained extended credit from my principals. I was influenced in giving and continuing credit on behalf of my principals to *William Murrell* by the belief that he was trading alone, and that the stock of woollen goods and pictures upon the premises belonged to him."

J. E. Webb, another creditor of the debtors' firm, deposed that he was not aware till after the commencement of the liquidation proceedings that the sons were partners with their father. And he said, "On many occasions when I have gone to the place of business *William Murrell* has taken me into the warehouse and counting-house of the firm, and pointed out several paintings which hung on the walls of such warehouse and counting-house, and some of which he has tried to sell to me. From the conversation which passed between *William Murrell* and myself I drew a conclusion that the said paintings were part of his business property. I saw nothing to indicate that there was any difference between the ownership of the pictures and the ownership of the woollen goods."

H. B. Lodge, the agent of some other *Yorkshire* creditors of the debtors' firm, made an affidavit in similar terms.

George Lendrum, another creditor of the firm, said, "My impression was from the remarks made by *William Murrell* respecting the said paintings that they belonged to the firm, and that the firm were carrying on a trade in paintings as well as in woollen cloths."

Winslow, Q.C., and *Swinfen Eady*, for the Appellants:—

The evidence shews that the pictures were in fact part of the joint property of the firm.

At any rate they were shewn to creditors of the firm, and were represented to them as joint property, in order to induce them to

give credit to the firm. The pictures were really in the order and disposition of the firm as reputed owners with the consent of the father: *Ex parte M'Kenna* (1); *Ex parte Hare* (2).

Horton Smith, Q.C., and *Horne Payne*, for the separate creditors, were not heard.

BAGGALLAY, L.J. (after stating the facts, and expressing his opinion that on the evidence the Registrar was right in holding that the pictures were in fact the father's separate property), continued:—

The question on which I have felt some little doubt is whether, inasmuch as the pictures were kept in the warehouse or in the counting-house of the firm, they must not be taken to have been in the reputed ownership of the firm. I think there would have been a great deal in that argument if, instead of pictures, the articles in question had been ready-made coats, or something else connected in some way with the business of the firm. It might well have been thought by the creditors that the firm were dealing in ready-made coats as well as in woollen goods not made up. But pictures had no connection whatever with the business of the firm, and I can see nothing to shew that they were ever treated as the property of the firm. There was nothing to give colour to the idea that the pictures were the property of the firm, not of the father. I agree that it is not necessary to shew that any particular creditor was deceived; it is enough to prove that the way in which the property was dealt with was calculated to deceive the creditors as to the ownership. But I can see nothing of that kind, and I have arrived at the conclusion, both that the pictures were in fact the separate property of the father, and that they were not in the reputed ownership of the firm.

COTTON, L.J.:—

On the evidence it appears to me clear that the pictures were separate property of the father. [His Lordship referred to the evidence.]

Then it is said that the pictures were in the reputed owner-

(1) 3 D. F. & J. 645. (2) 1 Deac. 16; 2 Mont. & A. 478.

C. A. 1883 *Ex parte* LOVERING. *In re* MURRELL. Cotton, L.J.

ship of the firm. The evidence that they were is this: They were kept on the partnership premises, and beyond that there is only some very indefinite evidence of conversations from which one or two creditors drew the inference that the pictures were the property of the firm. But one at least of the witnesses who says this, also says that he thought the father was the only member of the firm. This evidence, in my opinion, is not sufficient to outweigh the inference which arises from the nature of the chattels that they were in no way connected with the business of the firm. On both points I think the order of the Registrar was right.

LINDLEY, L.J.:—

I entertain no doubt on either point. The result of the evidence is, I think, that the pictures were really the father's separate property. As to the other point, it is true the pictures were hanging up in the warehouse of the firm, but I look for some evidence to shew that they were in the possession, order, or disposition of the firm as reputed owners. I think the true conclusion is, that they were in the order and disposition of the father; the firm never assumed to deal with them. Whatever might have been the case if the firm had been picture-dealers, it seems to me idle under the circumstances to say that these pictures were in the order and disposition of the firm. There was some evidence to go to the jury, but I think the decision of the Registrar was right.

Solicitors for the Trustees: *Rooks & Co.*
Solicitor for separate Creditors: *H. Montagu.*

W. L. C.

Ex parte McHENRY. *In re* McHENRY.

C. A.
1883
May 31;
June 7, 28,
29, 30.

Liquidation Petition—Failure to pass Resolutions—Delay—Power to adjudicate Debtor a Bankrupt—Pendency of Proceedings—Power to order fresh First Meeting of Creditors—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 125, *sub-s.* 12.

A debtor filed a liquidation petition in August, 1879. A receiver of his property was at once appointed, and injunctions were granted to restrain some of the creditors from proceeding against him for their debts. The first meeting of the creditors was held on the 20th of October, 1879, when it was resolved to adjourn to the 15th of December, 1879. Similar resolutions for adjournment were passed again and again, the meeting being ultimately, on the 15th of November, 1882, adjourned to the 28th of March, 1883. No resolutions for liquidation by arrangement or composition were passed. In January, 1883, two of the creditors applied to the Court of Bankruptcy by motion, under sub-sect. 12 of sect. 125 of the *Bankruptcy Act*, 1869, for an adjudication of bankruptcy against the debtor. At the adjourned meeting on the 28th of March, 1883, the creditors resolved that it was inexpedient in the interest of the creditors that any further proceedings should be taken under the petition, and that application should be made to the Court to discharge the receiver, and dismiss the petition, or stay all further proceedings under it. The Registrar, on the 3rd of May, made an adjudication. The debtor appealed, and on the hearing of the appeal an offer was made by a friend of his to pay the debts of the two creditors in full and to provide for their costs of the application, the payment to be made by the friend out of his own moneys, and an undertaking being given by him that neither directly nor indirectly should the payment be made out of the debtor's assets :—

Held, that, notwithstanding the resolution of the 28th of March, and having regard to the fact that the receiver had not been discharged, the liquidation proceedings were still pending, and that if the adjudication order was discharged, no other creditor would be injured, for that the Court would have jurisdiction to adjudicate the debtor a bankrupt on the application of any other creditor.

The adjudication was accordingly discharged on the terms of payment proposed, and on the undertaking of the debtor to apply to the Court of Bankruptcy for leave to summon a fresh first meeting of the creditors.

Held, by *Baggallay* and *Cotton*, L.JJ., and *semble per Bowen*, L.J., that the Court had jurisdiction to order a fresh first meeting of the creditors under the petition.

THIS was an appeal from an order made by Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy, adjudicating *James McHenry* a bankrupt.

C. A. 1883 *Ex parte* McHENRY. *In re* McHENRY.

On the 15th of August, 1879, *McHenry* filed a liquidation petition. A receiver of his property was immediately afterwards appointed, and injunctions were granted against some of the creditors to restrain them from proceeding against the debtor for their debts. Among his creditors were the *Erie Railway Company* for a sum of £268,989, which was due to them under a judgment of *Jessel*, M.R., in an action of *Jewitt* v. *McHenry*. *McHenry* gave notice of appeal from this judgment. The first meeting of the creditors was held on the 20th of October, 1879, when the following resolution was passed: "That this meeting be adjourned to the 15th of December, 1879. That having heard an explanation as to the debtor's position with reference to the pending appeal against the judgment of the Master of the Rolls in the suit of *Jewitt* v. *McHenry*, this meeting is of opinion that it is inexpedient in the interest of the creditors that the statement of affairs produced by the debtor should be now read, and resolved that such statement be handed to the receiver, to be retained by him and produced together with any amended or other statement of affairs." On the 15th of December, 1879, the adjourned meeting was held, and a similar resolution was passed adjourning the meeting to the 12th of January, 1880. On that day it was again adjourned, and this process was repeated again and again, the meeting being ultimately, on the 15th of November, 1882, adjourned to the 28th of March, 1883. No resolutions for liquidation by arrangement or composition were passed.

The appeal from the decision of the Master of the Rolls in *Jewitt* v. *McHenry* was heard by the Court of Appeal in March, 1881, and was dismissed. *McHenry* appealed to the House of Lords, but this appeal was not heard until July, 1883.

On the 30th of January, 1883, an application was made to the Court of Bankruptcy by motion on behalf of *Brown; Walker & Co.;* and *H. J. Walter*, persons who claimed to be creditors of the debtor, and whose names had been inserted by him in the request which he delivered to the Registrar as to notices of the first meeting of the creditors, asking that the debtor might be forthwith adjudicated a bankrupt under the power given to the Court by sub-sect. 12 of sect. 125 of the *Bankruptcy Act*, 1869. The debts of *Brown* and *Walker & Co.* were disputed. That of *Walter*

was admitted, but he had at an early stage of these proceedings appointed the debtor's solicitor his proxy in the matter, and this proxy had not been revoked, and the debtor's solicitor had as *Walter's* proxy voted in favour of the resolutions for adjournment. *Brown* and *Walker & Co.* had not voted for the adjournments. The Registrar refused the application, on the ground that sub-sect. 12 did not give the Court jurisdiction to make an adjudication in a case in which resolutions for a liquidation or a composition had not been passed. The three creditors appealed, and the Court of Appeal, on the 22nd of February, 1883, held (*vide Ex parte Walker* (1)), that the Court had jurisdiction to make the adjudication, but that *Walter* had no *locus standi*, because he had by his proxy voted for the adjournments. The Court, therefore, held that the application must be treated as made only by *Brown* and *Walker & Co.*, and they discharged the Registrar's order, and remitted the case to him to inquire whether *Brown* and *Walker & Co.* were in fact creditors of the debtor and for what amounts, and, if they were proved to be creditors, then to deal with the application on its merits.

At the adjourned meeting of the creditors held on the 28th of March, 1883, the following resolutions were passed:—

"That having regard to the pending appeal by the debtor against the judgment in *Jewitt* v. *McHenry*, and to the recent expression of opinion of the Court of Appeal, it is inexpedient in the interest of the creditors that any further proceedings should be taken under or by virtue of the liquidation petition.

"That application be made to the Court to discharge the receiver appointed under the petition, upon such terms as to payment of his costs and charges, and as to the disposition by him of the money and securities now in his possession, as the Court may deem reasonable and proper.

"That application be made to the Court for an order dismissing the petition, or for staying all proceedings upon or under the same."

After this the application came on to be heard by the Registrar again, and on the hearing an offer was made on behalf of the

(1) 22 Ch. D. 813.

C. A. 1883

Ex parte McHENRY. *In re* McHENRY.

debtor to pay the debts of *Brown* and *Walker & Co.* in full. Their counsel said that the payment could not be safely accepted by them after notice of an act of bankruptcy, and insisted on their right to an adjudication. They were asked what more the two creditors wanted than payment of their debts, and the answer was that they wished to have the debtor adjudicated bankrupt. The Registrar, on the 3rd of May, 1883, after hearing the evidence, came to the conclusion that *Brown* had established a debt of sufficient amount. But the Registrar did not come to any final conclusion as to the debt of *Walker & Co.*, inasmuch as the amount of it depended upon the result of the taxation of the costs of an action. And the Registrar made an order of adjudication against the debtor.

The debtor appealed.

Sir *H. Giffard*, Q.C., *E. Clarke*, Q.C., and *Finlay Knight*, for the Appellant:—

The debtor is entitled to have the validity of the alleged debts tried in an action: *Bankruptcy Act*, 1869, s. 9. He was willing to give security. The debts alleged were not proved by the evidence adduced. At any rate a creditor is not, under sub-sect. 12 of sect. 125, absolutely entitled to an adjudication; the Court has a discretion, and will have regard to all the circumstances: *Ex parte Brigstocke* (1); *Ex parte Shiers* (2). By the resolutions of the 28th of March the creditors have abandoned the liquidation, and any creditor can now take any proceedings he pleases against the debtor. This is not the kind of case contemplated by sub-sect. 12 (3). A friend of the debtor is willing to pay the

(1) 4 Ch. D. 348.

(2) 7 Ch. D. 416.

(3) Sub-sect. 12 of sect. 125 provides that, "If it appear to the Court on satisfactory evidence that the liquidation by arrangement cannot, in consequence of legal difficulties, or of there being no trustee for the time being, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the Court may adjudge the debtor a bankrupt, and proceedings may be had accordingly."

Rule 267 of the Bankruptcy Rules, 1870, provides that "In the event of any neglect on the part of the creditors to pass such resolution" (a resolution for liquidation or composition), "the Court may, on the application of any of the creditors, and after notice to the debtor, make an order of adjudication against the debtor."

debts of the Respondents if the Court is of opinion that they have been proved, or to pay the amount into Court pending a trial of the validity of the claims.

These proceedings are not taken *bonâ fide* in order to obtain the payment of the debts claimed by the Respondents; their object is to prevent the appeal in *Jewitt* v. *McHenry* from going on.

Charles Russell, Q.C., *Winslow*, Q.C., and *Sidney Woolf*, for the two creditors:—

The appeal in *Jewitt* v. *McHenry* has been pending in the House of Lords for two years; it might have been disposed of long ago if the debtor had been ready to prosecute it. The liquidation petition was filed nearly four years ago. Injunctions were granted to restrain some of the creditors from proceeding with actions for their debts, and their debts, as well as those of other creditors, may have become statute barred. If the adjudication is refused creditors in that position will be left without any remedy, for the liquidation proceedings are now at an end. Under sub-sect. 12 of sect. 125 the Court has power to adjudicate the debtor a bankrupt *mero motu* without the presentation of any petition: *Ex parte Marland* (1). By instituting the proceedings the debtor has admitted that he is insolvent. In *Ex parte James* (2) the Court of Appeal held that under rule 267 of the Bankruptcy Rules, 1870, an adjudication cannot in such a case as this be made without a petition founded on an act of bankruptcy. But in *Ex parte Charlton* (3) it was held that after the passing of composition resolutions the Court could, under the corresponding clause of sect. 126, adjudicate the debtor a bankrupt without the existence of any act of bankruptcy within six months. The Respondents, having notice of the act of bankruptcy committed by the filing of the liquidation petition, could not now safely receive payment of their debts from the debtor. They might be called on to refund: *Ex parte Jay* (4).

[Bowen, L.J.:—If in that case the payment of the debt had been made, not out of the debtor's assets, but by a friend of

(1) Law Rep. 20 Eq. 777.
(2) Ibid. 9 Ch. 609.
(3) 6 Ch. D. 45.
(4) Law Rep. 9 Ch. 133.

C. A. 1883

Ex parte McHENRY. *In re* McHENRY.

his out of his own moneys, would not the decision have been different ?]

The debtor, by means of the friendly creditors, has had the complete control of the proceedings, and has prevented the other creditors from doing anything. There is no reason why *Brown's* debt should be tried again ; the Registrar has heard the evidence and has decided that it is proved. That is enough to support the adjudication. The offer by a third party to pay the Respondents' debts was not distinctly made before the Registrar ; it was not made till the matter was before this Court. The Respondents could not safely accept payment from the debtor himself, and the Court has never yet allowed an outsider to intervene and pay creditors.

[COTTON, L.J.—It is not like the case of a petition for adjudication. The question is whether, if the applicants are paid, it can be said that the liquidation cannot proceed without injustice or undue delay to the creditors ?]

The other creditors object to the delay, and their rights will be prejudiced if the adjudication is refused, and individual creditors cannot be bought off in this way. The creditor who applies for the adjudication is a *quasi* representative of the other creditors : *Ex parte Brigstocke* (1). He is entitled to insist on an adjudication : *Ex parte Boss* (2).

Sir *H. Giffard*, in reply :—

The offer to pay the Respondents was made before the Registrar, but their whole object was to get an adjudication. They did not care about being paid. The making of an adjudication under sub-sect. 12 is a matter of discretion, not of right : *Ex parte Charlton* (3). The Court will exercise its discretion for the purpose of realizing the estate for the benefit of all the creditors, but no individual creditor has an absolute right to an adjudication. It must be proved to the satisfaction of the Court that the liquidation cannot proceed without injustice. The debts claimed by

(1) 4 Ch. D. 348. (2) Law Rep. 18 Eq. 375.
(3) 6 Ch. D. 45.

the Applicants are comparatively trivial; why have not the large creditors come forward?

[BAGGALLAY, L.J.:—If we should discharge the order of adjudication, will it then be open to any other creditor to apply under sub-sect. 12 for an adjudication? *Ex parte Fenning* (1).

COTTON, L.J.:—I think the resolution of the 28th of March is one of the greatest difficulties in your way.]

If the adjudication is discharged every creditor will be remitted to his right to petition in bankruptcy. But there is nothing to shew that the liquidation proceedings are entirely at an end. The receiver has never been discharged, and the Court would have power to direct a fresh first meeting of the creditors to be summoned under the petition. It is possible that the resolution of the 28th of March is inoperative. At any rate the proceedings are still sufficiently in existence to keep alive all the rights of the creditors.

[BAGGALLAY, L.J.:—If we discharge the order will the debtor undertake to apply to the Registrar for leave to summon a fresh first meeting?]

Yes. There is nothing in the Act or the rules to shew that the jurisdiction of the Court under the petition is absolutely at an end.

Winslow, in reply, as to the summoning of a fresh meeting:—

If the opinion of the creditors has once been validly taken the whole thing is at an end, and there is no jurisdiction to grant a new meeting under the same petition: *Robson* on Bankruptcy (2); *Ex parte Cobb* (3). The resolutions passed in the present case have been passed with the view of escaping from the effect of sect. 125. The creditors have in substance said, we will get rid of the petition altogether.

[BAGGALLAY, L.J., referred to *Ex parte Terrell* (4).]

The creditors have not, as in that case, been prevented by the circumstances from coming to any valid resolution or deter-

(1) 3 Ch. D. 455.
(2) 4th Ed. p. 761.
(3) Law Rep. 8 Ch. 727.
(4) 4 Ch. D. 293.

C. A. 1883

Ex parte McHenry. *In re* McHenry.

mination; they have shewn a determination not to pass any resolutions at all.

If we should receive payment of our debts, in the way proposed, from a third party, and it should afterwards turn out that the money was really the debtor's money, we might be called on to refund it, inasmuch as we have notice of an act of bankruptcy.

Baggallay, L.J. (after stating the facts, and expressing his opinion that on the evidence before the Registrar it was proved that debts of a sufficient amount were due to the opposing creditors), continued:—

Then the question is, whether the circumstances of the case were such as to bring it within the language of the 12th sub-section of sect. 125? Was it made to "appear to the Court on satisfactory evidence that the liquidation by arrangement cannot, in consequence of legal difficulties, or of there being no trustee for the time being, or for any sufficient cause, proceed without injustice or undue delay to the creditors, or to the debtor"? On the one side it has been strongly urged that the application of the two creditors for an order of adjudication was not *bonâ fide*, but was made for the mere purpose of procuring Mr. *McHenry* to be made a bankrupt and of thereby staying the proceedings in the House of Lords. On the other hand, it was as strongly urged that the Applicants were entitled to give effect to their rights. This, however, occurred when the matter was first before the Registrar; a statement was made (I will not say that it was made in any tangible form), but a suggestion certainly was made, that Mr. *McHenry* was prepared to pay the debts due to these two creditors in full, and that was held out as an inducement for not making an adjudication. That proposition was certainly not made in a form in which the Court could be justified in listening to it, because, while liquidation proceedings were pending it could not be allowed that the debtor should take a portion of his assets for the purpose of paying particular creditors who were giving him a great deal of trouble. But, probably, had the matter been more fully gone into before the Registrar, the same offer would have been made which has been made before us, viz. that the money to pay these debts shall be provided otherwise than out of the debtor's

C. A.
1883
Ex parte McHENRY.
In re McHENRY.
Baggallay, L.J.

assets, and upon the most distinct understanding that neither directly nor indirectly shall his assets become liable for the payment of these debts. Probably the offer on the part of Mr. *McHenry* would have been put in that form when the matter was before the Registrar but for the course which was pursued on the part of the creditors, because, when the offer was made, Mr. *Clarke* on behalf of Mr. *McHenry* said, "I think I ought to ask my learned friend whether he wants anything except payment of his debt"? Thereupon Mr. *Winslow's* answer was, "Yes, I want to adjudicate this man a bankrupt." What that may have meant it is unnecessary now to consider, but to my mind it evidently shews that the question of payment of the Applicants' debts was tabooed, if I may use the expression. An offer of a different character has now been made. But was the Registrar justified in making the order at the time when he made it? I am bound to say that, seeing there had been no offer of payment which the Court could have properly accepted, I think the Registrar was right. The liquidation proceedings had been pending for very nearly four years. How much longer were they to go on? The proceedings were not satisfactory to the particular creditors who were making the application. One of them, Mr. *Brown*, had in no way been a party to any of these adjournments, and, so far as I can gather, his firm had been opposing creditors whenever there was any opportunity for opposition, but that is not material. I must confess it appears to me that the only thing which could be done was to make an order for adjudication. The matter now comes before us, and we have to consider whether, an offer to pay these debts being now made in the form which I have mentioned, so as in no way to involve Mr. *McHenry's* assets, we ought to allow the order of adjudication to stand, or to discharge it?

There is a good deal to be said on both sides. What would be the position of the other creditors if the liquidation proceedings are at an end and the order of adjudication is discharged? How many creditors have been restrained from enforcing their rights during this period of time against whom the *Statute of Limitations* may have been running? That I think is a very serious matter for our consideration when we are asked to discharge the order for adjudication.

C. A. 1883 *Ex parte* McHENRY. *In re* McHENRY. Baggallay, L.J.

But I think we have to consider another thing. These particular creditors who are making the application will not in any way suffer by the discharge of the order on the terms which have been mentioned. They will be paid their debts in full. But we are bound to see whether any other creditors will be prejudiced by that course being taken, and therefore we must ascertain what will be the state of the proceedings if the adjudication is discharged. Will the rights of other creditors be prejudiced? Will it be open to any other creditor to come and ask for an adjudication, or would he be prevented from so doing? After a great deal of consideration, it appears to me that, if we discharge the order of adjudication on the terms proposed, on payment of the Applicants' debts in full by a third party, we shall not be injuring other creditors or preventing them from asserting their rights, if they think it desirable to do so. The question is, whether the practical effect of the resolutions of the 28th of March is to put an end to the liquidation proceedings? Are there proceedings in liquidation still pending so as to enable any other creditor, who desires to do so, to avail himself of the provisions of the 12th sub-section, if he has got the proper materials? I have come to the conclusion that there are. If no receiver had been appointed the case might have been very different. But a receiver has been appointed and he has never been discharged, and although the first general meeting of the creditors originally announced and advertised cannot now be held, by reason of there having been no adjournment on the last occasion, yet it is I think perfectly open to allow a fresh first meeting to be summoned, and the liquidation proceedings could then be revived by the passing of resolutions, even if there has been suspended animation, so to speak, since the 28th of March. I am indeed disposed to think that, quite apart from the holding of a new first meeting, there is now sufficient vitality in the liquidation proceedings to entitle any creditor, who may be disposed to do so, and who has got the proper materials, to apply to the Court to-morrow for an order of adjudication against the debtor. If this be so, or if with the assistance of a fresh first meeting any other creditor can apply for an adjudication, it appears to me that the other creditors will not be prejudiced by our discharging the order of

adjudication, because it will be open to them immediately to assert and enforce the same right which has been asserted by these two creditors. But, as I have said, I am of opinion that this could be done as the proceedings now stand.

I think, therefore, that if we discharge the adjudication Mr. *McHenry* should be put upon an undertaking to apply for another first meeting. If that undertaking is given, and if the debts of the two opposing creditors are paid immediately, or, in the case of *Walker & Co.*, the money is brought into Court to abide the result of the taxation of costs, the order of adjudication will be discharged. The payment must be made otherwise than out of the assets of Mr. *McHenry*.

COTTON, L.J.:—

I am of opinion that both of these creditors have proved debts of a sufficient amount to entitle them to claim an adjudication in bankruptcy against Mr. *McHenry*.

Then we come to a much more difficult and a very important question—what in that state of things ought to have been done by the Registrar, and there I differ a little from Lord Justice *Baggallay*. The 12th sub-section gives to the Court what I may call an extraordinary power of making an adjudication of bankruptcy; if it appears that, in consequence of legal difficulties, or of there being no trustee for the time being, or for any sufficient cause, the liquidation cannot proceed without injustice or undue delay to the creditors, the Court may adjudge the debtor a bankrupt. And what we have to consider is this: can these particular creditors complain that by reason of the course which has been taken they are suffering injustice or undue delay? That must mean an injustice arising from the non-payment of their claims, or the non-distribution of the debtor's estate so as to provide for them, and an undue delay in obtaining payment. Now I am satisfied that it was not the payment of their debts which these creditors were desirous to obtain. What their object was it is not necessary for me to say, but from the passage in the notes of what occurred before the Registrar which was referred to by Lord Justice *Baggallay*, I come to the conclusion without any hesitation that their object in these proceedings is not to obtain payment of

C. A. 1883

Ex parte McHENRY. *In re* McHENRY.

Cotton, L.J.

their debts, but that they have some other indirect object. It is suggested that their object is to put an end to the appeal in the House of Lords. That may or may not be so, but I am satisfied that they are not coming here in consequence of injustice, or undue delay in the payment of their debts. If I had come to a different conclusion on this point, I should say that they had made out a very strong case for an adjudication, because undoubtedly there has been very great delay in the liquidation proceedings, though I do not say that the matter is so fully before us that we can determine that this delay was not the best course for all parties. There has been very great delay, and, that being so, we must consider what ought to be done, even though these two creditors are not prejudiced by reason of injustice or undue delay, because, in my opinion, we ought to consider the interests of the other creditors. If we were satisfied, either that no other creditor could bring forward his case if we should discharge the adjudication, or that there are creditors who are unduly or unjustly delayed in the payment of their debts, the matter might stand very differently. If I thought that after what has taken place and in the existing state of things any other creditor is really delayed, any creditor who is really acting honestly (I prefer the English expression to the Latin *bonâ fide*) would be aggrieved by not being able to bring forward his case, I should come to a different conclusion. But the conclusion at which I arrive is this, that the liquidation proceedings are still pending. There is still a receiver, and *Ex parte Jeffery* (1) shews that so long as there is a receiver the liquidation proceedings are still pending, and the Court has jurisdiction. If that is so, in my opinion any other creditor who has been delayed by the course which has been taken is now in a position to apply to the Court for an adjudication of bankruptcy. It is said that this is not so, but that it was decided in *Ex parte James* (2) that after the first meeting of the creditors under a liquidation petition has separated without adjourning and without coming to any liquidation resolution, then in order to obtain an adjudication against the debtor a petition is necessary, relying on the act of bankruptcy committed by the filing of the liquida-

(1) Law Rep. 9 Ch. 144. (2) Law Rep. 9 Ch. 609.

tion petition, an act which in the present case is too long past to be now relied on. If I thought that that had really been so decided, I should not have expressed the opinion which I have expressed, and which is the foundation of my present decision. But in *Ex parte James* (1) the question was an entirely different one. In that case there had been a petition for liquidation, and the sheriff had seized the debtor's goods under an execution, and had sold them. No liquidation resolutions were passed at the meeting of the creditors, and immediately afterwards the proceeds of sale were paid by the sheriff to the execution creditor. Two days afterwards a bankruptcy petition was presented, relying upon the act of bankruptcy committed by the filing of the liquidation petition, and it was contended that under these circumstances the sheriff had no right to pay over to the execution creditor the proceeds of the levy. It was held that he was justified in so doing, and that the execution creditor could retain the money, because there was no adjudication of bankruptcy made upon any petition which was pending at the time of the levy on which the sheriff acted. It is true that Lord Justice *Mellish* said (2), "I think that, according to the true construction of the 125th section, it was not contemplated that a debtor who has filed a liquidation petition should be adjudicated bankrupt on the petition for liquidation without a petition in bankruptcy, unless the case came within the 12th sub-section of that section. Whether under that sub-section, the debtor could be adjudicated bankrupt without a petition in bankruptcy, it is not necessary now to decide, because it appears to me that that sub-section only applies to cases in which the creditors have passed a resolution, and made some progress in the liquidation. The Chief Judge has very properly decided that an application under the 267th rule must be made by petition. At any rate, in my opinion, an execution creditor cannot have his rights taken away by the rules. I am therefore of opinion, consistently with *Ex parte Villars* (3), that, as soon as the prosecution of the proceedings in liquidation became impossible, the sheriff, having no notice of any other petition, was justified in paying over the money to the execution creditor, and that it cannot be recovered from him." What Lord Justice

(1) Law Rep. 9 Ch. 609. (2) Law Rep. 9 Ch. 615.
(3) Law Rep. 9 Ch. 432.

C. A. 1883 *Ex parte* McHENRY. *In re* McHENRY. Cotton, L.J.

Mellish then said about sub-sect. 12 was merely *obiter dictum*, and it has been decided not to be law by the Court of Appeal in this very case, *Ex parte Walker* (1), for the Court there held that an application for an adjudication under sub-sect. 12 could be made by motion. I am of opinion, and it is right to say that that is the foundation of my decision in the present case, that any other creditor who has been delayed, and who is honestly desirous of getting payment of his debt by means of an adjudication of bankruptcy, is still in a position to apply to the Court for an order of adjudication. I certainly did find great difficulty in consequence of the resolutions which were passed on the 28th of March, and which practically amounted to an attempt to put an end to the liquidation proceedings. The creditors separated after passing those resolutions, and there was then an end of the first meeting. But, in my opinion, the Court has power, not for the benefit of the debtor, but in order to prevent any creditor from being prejudiced by the liquidation proceedings being stopped, to allow a fresh first meeting. The Registrar will deal with an application for that purpose as he thinks right, but I think we ought to put the Appellant Mr. *McHenry* under an undertaking to apply to the Registrar within a limited time, say ten days, to appoint a fresh first meeting, in order that any creditors who may, in consequence of our discharging this order, or for any other reason, desire that the liquidation should go on, should have another opportunity of bringing that question before the meeting, and, if the other creditors are satisfied that it will be for their interests to go on with the liquidation, of getting liquidation resolutions passed. But it is said that the Court has no power to make such an order, and it is necessary to consider that. *Ex parte Cobb* (2) was referred to, but that was an entirely different case from the present. In that case there was an attempt to get a fresh first meeting with the object of enabling the debtor to try and induce the creditors, who had refused to allow him to liquidate by arrangement, to come to a different conclusion. That, Lord Justice *James* said would be wrong. But the point was raised again in *Ex parte Gibbs* (3), in which Lord Justice *Mellish* said (4): "I am of opinion that the

(1) 22 Ch. D. 813.
(2) Law Rep. 8 Ch. 727.
(3) Law Rep. 10 Ch. 382.
(4) Ibid. 384.

decision of the Registrar in this case was perfectly right. The question is under what circumstances a Registrar is entitled to order a fresh first meeting to be held under a petition for liquidation or composition; and I entirely agree with what was said by Lord Justice *James* in *Ex parte Cobb* (1), that if the opinion of the creditors has been validly taken at a meeting, and the creditors have refused to pass a resolution, in that case the Registrar has no right to order a fresh meeting; the creditors have come to their determination, and they are not to be obliged to come together a second time to re-consider their resolution. But if from some accident, or some mistake on the part of the debtor, no valid resolution has been or could be passed, then it appears to me that, fairly considering the Act (though it is true there is neither rule nor section ordering it) a fresh meeting may be held; for if the meeting was held so as not to give the creditors an opportunity to determine one way or the other, whether for composition or liquidation, then the Court, though it has no express power given to it to call a fresh first meeting, yet has the discretion to determine whether a fresh first meeting should be called or not." I understand Lord Justice *Mellish* to lay down, and I entirely agree with him, that the Court has a discretion to order a fresh first meeting to be called. If the application is made merely because the debtor, not having so many friends as he expected at the meeting, has got an adverse decision, it would be wrong to call a fresh meeting in order that he might try to induce his creditors to come to a more favourable decision. Lord Justice *Mellish* did not profess to exhaust the reasons for ordering a fresh meeting, and there is another case, *Ex parte Terrell* (2), in which a fresh first meeting was ordered. In my opinion, the Court has jurisdiction in the present case to order a fresh first meeting, not for the benefit of the debtor, but in order that the creditors may re-consider the resolution of the 28th of March, which, I think, was an improper resolution, and one which they had no right to pass in order to put a stop to the proceedings. I think they ought to have an opportunity of re-considering their determination, more especially (and that weighs with me most) as there may be creditors who think that

(1) Law Rep. 8 Ch. 727. (2) 4 Ch. D. 293.

BIBL. LONDIN UNIV.

C. A. 1883 *Ex parte* McHenry. *In re* McHenry. Cotton, L.J.

an adjudication will not be so favourable to them as a liquidation, and desire that the liquidation should go on. In my opinion the Court has the power, and in this case I think it would be right, to order a fresh first meeting to be held, in order that the matter may be re-considered. And there is this further consideration as regards the present Applicants. I think there was before the Registrar substantially an offer which, if the creditors had been really desirous of obtaining payment of their debts, would have led to the offer which has now been made. Of course no payment could be made to them by Mr. *McHenry*. But now it is said that some third party will come forward (I think his name ought to be stated to the Court, in order that there may be no doubt about the honesty of the offer) and pay these two creditors their debts in full, and also the costs of this application, which they would be entitled to receive on taxation. If that is so, it will remove all possible complaint of injustice or undue delay on their part. I think the Registrar would have been right in accepting that offer and in not making any adjudication having regard to the other circumstances of the case. I agree with Lord Justice *Baggallay* that the payment must be made under the most distinct understanding that the money is not in any way to come out of the debtor's estate, and that any payment or repayment of it out of his estate will be a contempt of this Court; and the payment must be made immediately. In the case of *Walker & Co.*, there must be a payment into Court of a sufficient amount to meet the debt and the taxed costs which Mr. *McHenry* is liable to pay, and there must also be deposited a sum sufficient to provide for the costs of these proceedings. I think a creditor whose debt has been disputed has a right to all the costs of the proceedings. On these conditions I am of opinion that it will be right to discharge the order of adjudication which has been made.

Bowen, L.J.:—

I am of opinion that the debts of the two creditors are proved.

The case is complicated by the offer made at the eleventh hour to pay these debts in full. The creditors in question seemed in the first instance disinclined to accept payment in full. They

put forward that which is certainly an extremely plausible objection, that they cannot safely receive payment in full from the assets of the liquidating debtor, and to overcome that objection (I do not know whether it arises from the ingenuity of the lawyers, or from the prudence of the creditors themselves, probably from the ingenuity of the lawyers) at the last moment some friends of the debtor come forward and say, "You shall be paid in full without touching a single asset of the debtor, and we will pledge ourselves to the Court, and bind ourselves by an undertaking, which the Court may enforce against us if we ever break it, that we will not look, directly or indirectly, to the assets of the debtor for this money." The creditors still hang back, they apparently want, not their pound sterling, but their pound of flesh, and they argue that they are bound to investigate the title of the benevolent friends who come forward to help Mr. *McHenry* to the money which they offer to produce. I confess I think that the danger of the payment having to be returned, if it is made under the circumstances with the authority of this Court, is so remote, that I come to the conclusion as a matter of fact that the creditors in question will be amply protected, and that they have nothing to gain by having Mr. *McHenry* adjudicated a bankrupt, so far as the payment of their debts is concerned. And that drives me to the consideration of the 12th sub-section of sect. 125 of the Act. What does it mean? Now sub-sect. 12 is part of the machinery provided by the Act for the benefit of creditors, with the view of giving them in respect of their just debts a claim to be satisfied proportionately out of the debtor's assets. The exercise of the power given by this sub-section is entrusted to a judicial tribunal, and the words which confer the power on the Court are, as is usually the case, permissive, not compulsory. The words confer on the tribunal the power to afford relief on a fitting occasion having regard to the circumstances—the power of doing justice in a proper case. When a proper case arises, and the debtor can only obtain relief by the employment of the means which the Act provides, it gives him the moral right to demand that relief, and imposes on the Court the duty to grant it. In that sense permissive words become in an Act of Parliament compulsory. But the Court is not bound

C. A. 1883 *Ex parte* McHENRY. *In re* McHENRY. Bowen, L.J.

to set in motion machinery of this sort, if no possible end can be gained by it. To employ statutory machinery for nothing, is to employ it for an end for which it is not intended. This would be an abuse and not a use of the power. I think it would be really outrageous to adjudicate Mr. *McHenry* a bankrupt under sub-sect. 12 if none of the results would follow for the sake of which the Legislature has framed that sub-section. In the present case what would be gained by an adjudication? I have already said that the Respondents will be amply protected, and that they have nothing to gain by an adjudication, but I admit that does not exhaust the case, because the Court must look all round to see who can be injured by refusing the adjudication, and if they can see that injustice will be done to any one, they will still make use of the power given by this sub-section.

It has been indeed suggested (I think it was by Mr. *Russell* in his powerful argument) that a creditor has a right to assume to himself the duty of a public prosecutor, and, although he has nothing to gain himself, yet for the sake of the Act of Parliament he is entitled to ask that it shall be enforced by way of the vindication of morality, so that a man may be made a bankrupt who has been guilty of delay in his liquidation proceedings, though no possible object can be gained by it except that of punishing him. I confess I do not think that is the object of this sub-section, and although the desire to vindicate public justice is an excellent quality, it is, in my experience, a somewhat rare one, and I should distrust that sort of application to the Court. If, however, the effect of setting aside the adjudication would be that the other creditors would be left out in the cold, or would be relegated to the horns of a dilemma, that they would be obliged either to go on at the risk, perhaps, of the *Statute of Limitations* now barring their actions, or to abandon their claims, that would be a very good reason for putting in force this sub-section, not for the benefit of the Applicants, but for the benefit of the other creditors. It seems to me, however, that the other creditors will be amply protected. No doubt, sub-sect. 12 can only be employed when liquidation proceedings are in existence, and when the Court is clothed with jurisdiction over the debtor and his affairs. It assumes that there are liquidation proceedings

being prolonged, the prolongation of which will be more unjust to the creditors than the conversion of them into a bankruptcy. Supposing we set aside this order of adjudication, will these liquidation proceedings still exist as far as to give any creditor who is aggrieved a *locus standi* to apply therein for an order of adjudication in respect of his own debt? The resolution passed on the 28th of March had the effect of interposing great difficulties in the liquidation proceedings. The creditors determined not to go on with them, but to apply to the Court to discharge the receiver, and to put an end to the proceedings and dismiss the petition. But I am of opinion that the liquidation proceedings still survive, and, whether a fresh first meeting can or cannot now be held, I agree with the other members of the Court that Mr. *McHenry* should undertake to apply for it. I am inclined to think that it can be held, but, whether that be so or not, I am satisfied that any other creditor is now in a position, even if we discharge the order of adjudication, to apply under sub-sect. 12 to have the liquidation proceedings converted into a bankruptcy, and that the liquidation proceedings continue, so far as it is necessary to give jurisdiction to do that. And that view of the law is really my *ratio decidendi* in this case. So far as I am concerned, I decide this case as I do because I think that is the law. If it was not, I think I should decide this case otherwise. I entirely agree with what has been said as to the terms which are to be imposed on Mr. *McHenry*, and in conclusion I can only say that I am satisfied that no injustice will be done to the Respondents, or to any other of the creditors, by the decision at which we have arrived.

Winslow asked for leave to appeal to the House of Lords.

The COURT refused to give leave.

Solicitor for Debtor: *G. A. Sedgwick.*
Solicitors for Creditors: *Munns & Longden.*

W. L. C.

C. A.
1881
V.-C. B.
Nov. 30;
Dec. 1, 13, 14, 15, 21.
C. A.
1883
May 2, 7, 8.
June 4.

KALTENBACH *v.* LEWIS.

[1880. K. 0203.]

Principal and Agent—Advances by Brokers to Agent for Sale—Antecedent Debt—Factors Act, 5 & 6 *Vict. c.* 39 [*Revised Ed. Statutes vol. viii., p.* 1146].

K., in *Singapore*, was in the habit of consigning goods to *M.* in *London* for sale. *M.* employed *L.* and *P.*, *London* brokers, in the sale of these goods, and in other extensive sales and purchases, and died in May, 1880, heavily indebted to them on the balance of his account. Shortly before *M.'s* death *K.* had consigned cargoes to *M.* by several different ships. *M.* put them in the hands of *L.* and *P.* for sale, and pledged to them the several bills of lading for separate advances made by them to him on the respective cargoes. As between *K.* and *M.* these pledges were unauthorized and improper; but *L.* and *P.* had no notice of any impropriety. One cargo had been sold before *M.'s* death, but not delivered nor paid for. The others remained unsold at his death, and were not sold until after the commencement of an action by *K.* to recover them. *L.* and *P.* claimed a general lien on the balances of the proceeds of all the cargoes after repayment of the specific advances, resting their claim on an alleged agreement with *M.* to that effect and on mercantile usage:—

Held, by the Court of Appeal, that neither such agreement nor such usage were established in evidence, and that if they had been, such a general lien could not be claimed under the *Factors Act*:—

Held, that apart from the *Factors Act*, *K.*, an undisclosed foreign principal, could not sue *L.* and *P.* for the proceeds of goods properly sold by them in *M.'s* lifetime, or, if he could, he could only sue as representing *M.*, and subject to all rights of set-off available against *M.*, and that therefore *L.* and *P.* were entitled to a lien on the balance of the proceeds of the sold cargo although it was not delivered or paid for in *M.'s* lifetime:—

But *held*, that as regards the goods unsold at *M.'s* death, *K.* was entitled to them subject only to the payment of the sums for which they were respectively specifically pledged.

L. and *P.* bought goods for *M.*, not disclosing the fact that they bought as agents, and were therefore as between them and the vendors personally liable to pay. On the day before the day of payment *M.* asked *L.* and *P.* to make him an advance on the security of one of *K.'s* cargoes, to enable him to pay for those goods. *L.* and *P.* did so, and the goods were thus paid for through *L.* and *P.* They knew that the cargo pledged did not belong to *M.*, but nothing further; and they did not know whether the goods bought by *M.* were bought on his own account or not:—

Held, that as *M.* was not at the time of the advance indebted to *L.* and *P.* in respect of the goods bought, though they were sureties for the

payment, the pledge was not a pledge to secure an antecedent debt within the meaning of 5 & 6 Vict. c. 39, s. 3, and was valid, there being nothing in the circumstances to give them notice that *M.* was violating his duty to his principal.

THE Plaintiffs in this case were merchants at *Singapore*, and were in the habit of consigning goods to *Charles Meyer*, a merchant and commission agent in *London*, for sale on their behalf. *Meyer* did not make advances to the Plaintiffs on the goods consigned, but accepted bills drawn by the Plaintiffs against them. If, when the bills fell due, goods had been sold sufficient to pay the bills, he paid them out of the proceeds, and if he had not moneys of the Plaintiffs in hand, the Plaintiffs made arrangements for renewing the bills until the goods against which they were drawn were sold, so that *Meyer* was never under advances, and, as between him and the Plaintiffs, had no right to pledge the goods.

Meyer employed the Defendants, *Lewis* and *Peat*, who were produce brokers in *London*, not only in selling the Plaintiffs' goods but also about other sales and purchases to a large amount.

On the 5th of May, 1880, *Meyer* died insolvent, and heavily indebted to the Defendants on his account with them. The goods to which this action related had been consigned to him by the Plaintiffs in six different ships, the *Beaconsfield*, *Comus*, *Glen Callach*, *Soteria*, *Lansdowne* and *Antenor*, and had been placed in the hands of the Defendants for sale.

The goods consigned by the *Beaconsfield* and *Comus* were agreed to be sold by the Defendants before *Meyer's* death, and deposits to the amount of about £300 had been paid; but the times for completion did not arrive till after *Meyer's* death. As regards the *Antenor*, the Defendants made advances to *Meyer* in respect of that cargo, and afterwards, in his lifetime, sold it; repaid themselves their advances, and carried the balance to his credit in their general account with him. The goods consigned by the *Glen Callach*, *Soteria* and *Lansdowne* were unsold at *Meyer's* death, but were in the Defendants' hands for sale, and had not been sold at the commencement of this action.

The Defendants had made advances to *Meyer* of £2000 on the goods consigned by the *Beaconsfield*, and £200 on those consigned by the *Soteria* and *Lansdowne*. After payment of those advances

C. A. 1883 KALTENBACH v. LEWIS.

there would be a considerable balance in hand, and as regards those cargoes no other specific advances were shewn. As regards the *Comus* and *Glen Callach*, specific advances of £3000 and £800 were made by the Defendants under the following circumstances.

On various occasions *Meyer* made large purchases of shell-lac through the Defendants as his brokers. The Defendants did not disclose to the vendors the fact that they were agents, and so as between them and the vendors they were the persons liable to pay, though as between themselves and *Meyer* he was the person liable. On the 20th of February, 1880, *Meyer* applied to the Defendants for an advance of £3000 on the bill of lading of the goods per *Comus*, to enable him to make a payment for some shell-lac then purchased, which was due on the following day. The Defendants accordingly gave him a cheque for £3000 on that security, and *Meyer* on the following day gave them a cheque for a somewhat larger amount, and by these means the shell-lac was paid for. An advance of £800 was made under precisely similar circumstances in April, 1880, on the security of the bills of lading for the consignment by the *Glen Callach*. As regards the last-mentioned consignment the Defendants knew that *Meyer* was acting for a principal, but whether they knew it as regarded the consignment by the *Comus* did not clearly appear. It appeared that the Defendants did not know anything about the Plaintiffs or of the relations between them and *Meyer*, nor did they know on whose behalf *Meyer* was acting as regarded the purchases of shell-lac.

The Plaintiffs, on the 14th of May (*Meyer* having died on the 5th), commenced this action, asking a declaration that the advances purporting to have been made by the Defendants to *Meyer* were not advances in respect of which the Defendants could claim or acquire any charge or lien on the Plaintiffs' goods under the *Factors Acts*, delivery up of the unsold goods, payment to the Plaintiffs of the purchase-money for all goods sold, the proceeds of which had not been actually paid to the Plaintiffs, and, in particular, payment of the net proceeds of the *Beaconsfield* consignment, or in the alternative that an account might be taken of what was due to the Defendants in respect of advances made by them to *Meyer* on the bills of lading or goods of the Plaintiffs in

respect of which the Defendants should be held entitled to any lien on the bills of lading or goods, or the proceeds thereof, and that upon payment of what should be so found due the Defendants might be ordered to deliver to the Plaintiffs the unsold goods, and the proceeds of such goods as had been sold, less the expenses of the sale.

The case made by the Plaintiffs was that no advances were *bonâ fide* or really made by the Defendants to *Meyer* in respect of which they could claim the protection of the *Factors Acts*, but that they obtained securities from *Meyer* on the Plaintiffs' goods to cover balances due from *Meyer* to them in respect of his own speculative transactions and dealings with them on his own account.

The Defendants by their statement of defence alleged that they had, in the ordinary course of business, made advances to *Meyer* on the security of the bills of lading deposited with them, and that throughout the transactions it was agreed that the Defendants should hold each security as a security for the balance due from *Meyer* to them, and not merely for the sums specifically advanced upon it. The Defendants accordingly claimed a lien on the proceeds of sale of all the cargoes for what was due to them from *Meyer* on the balance of his account.

On the evidence the Court came to the conclusion that the Defendants had acted *bonâ fide*, and that no improper conduct could be imputed to them, and on the appeal the case of misconduct was abandoned.

The action came on for hearing before Vice-Chancellor *Bacon* on the 30th of November, 1881.

Webster, Q.C., *Millar*, Q.C., and *Everitt*, for the Plaintiffs :—

The Defendants have not acquired any charge, pledge, or lien upon the goods of the Plaintiffs under the *Factors Acts*, or otherwise. *Meyer* was a mere agent for the purpose of sale on behalf of the Plaintiffs, and was not an agent intrusted with and in possession of goods, or the documents of title thereto, within the meaning of the *Factors Acts*, and had no authority to pledge the bills of lading to the Defendants, who took them with notice

C. A. 1883 KALTENBACH v. LEWIS.

of the Plaintiffs' rights: *Fuentes* v. *Montis* (1); the bills of lading being in *Meyer's* possession only as a security for repayment of his advance and charges, and subject to that security Plaintiffs retained their right to the bills of lading and the goods thereby represented: *Spalding* v. *Ruding* (2). But it is immaterial whether the Defendants did or did not know that these bills of lading belonged to the Plaintiffs, for admitting that *Meyer* could pledge them, and that the Defendants could make advances to him as an agent within the meaning of the *Factors Acts*, the Acts do not apply to antecedent debts, but are limited to *bonâ fide* advances made at the time of the pledge. We say that the Plaintiffs' goods were pledged by *Meyer* not as a security for *bonâ fide* advances against the goods, but, as a circuitous mode of meeting antecedent debts for which *Meyer* was liable to the Defendants, and accordingly the operation of the *Factors Acts* is excluded: *Macnee* v. *Gorst* (3); *Learoyd* v. *Robinson* (4); *Smith's* Leading Cases (5); *Phillips* v. *Huth* (6). In fact the money was advanced by the Defendants to enable *Meyer* to meet his antecedent liabilities to themselves, and there was a mere exchange of cheques in order to meet a debt due or about to become due, the transaction being an attempt on the part of *Meyer* to pay his own debt with the goods of the Plaintiffs. In any case the Defendants are only entitled to a lien for moneys actually advanced, and not for their general balance.

Benjamin, Q.C., *Horton Smith*, Q.C., and *Northmore Lawrence*, for the Defendants:—

The Defendants are entitled to the protection of the *Factors Acts*. What they did was done in the ordinary course of business as brokers for *Meyer* only, and not as principals, and according to the general custom of brokers they are entitled to retain the proceeds of goods which, as in this case, were pledged as a security for their general account. The *Factors Act*, 1842, s. 2, authorizes the substitution of other goods for those deposited in considera-

(1) Law Rep. 3 C. P. 268.
(2) 6 Beav. 376.
(3) Law Rep. 4 Eq. 315.
(4) 12 M. & W. 745.
(5) 8th Ed. vol. i. pp. 830, 836.
(6) 6 M. & W. 572.

tion of a previous advance, and what here took place was not, as the Plaintiffs allege, a mere exchange of cheques but a change of securities, and in every case there was a *bonâ fide* advance. Knowledge on the part of the Defendants that *Meyer* was only an agent in respect of the goods pledged does not affect the validity of the pledge or deprive the Defendants of the protection of the Acts unless they had notice that *Meyer* was acting *malâ fide* and in excess of his authority: *Navulshaw* v. *Brownrigg* (1). There was no privity of contract, nor any fiduciary relation between the Plaintiffs and the Defendants, who are entitled, as against the Plaintiffs, to hold the proceeds of the goods in satisfaction of the general balance due to them from *Meyer: New Zealand and Australian Land Company* v. *Watson* (2); *Armstrong* v. *Stokes* (3); *Maspons y Hermano* v. *Mildred, coram Manisty*, J., *Times*, 9th Dec., 1881. The Plaintiffs have by their pleadings insinuated charges of fraud and conspiracy against the Defendants, for which there is no justification whatever, and as these charges have failed the action must be dismissed, and the Plaintiffs must pay the costs: *Wilde* v. *Gibson* (4); *Johnson* v. *Fesenmeyer* (5); *Blest* v. *Brown* (6). The Plaintiffs can take *Meyer's* place if they like, and have the goods on paying what he owed us, but *Meyer's* estate is not represented in this action, and therefore no account can be directed.

Webster, in reply:—

The Defendants have distorted the allegations of the statement of claim, which states ordinary commercial transactions, not, as we say, protected by the *Factors Acts*, into charges of fraud and conspiracy. The cases which they have cited to shew that a bill which is framed on fraudulent concealment or fraudulent conspiracy, where that title to relief fails, must be dismissed with costs, are wholly inapplicable. The Plaintiffs have not charged and do not rest their case upon any fraud on the part of the Defendants. They have simply charged them with notice, when they made the advances, of the circumstances and position in which *Meyer* held the goods as agent for the Plaintiffs. If those

(1) 2 D. M. & G. 441.
(2) 7 Q. B. D. 374.
(3) Law Rep. 7 Q. B. 598.
(4) 1 H. L. C. 605.
(5) 25 Beav. 88; 3 De G. & J. 13.
(6) 4 D. F. & J. 367.

C. A. 1883 KALTENBACH v. LEWIS.

advances were *bonâ fide* advances within the meaning of the *Factors Acts*, knowledge by the Defendants that the goods were the property of the Plaintiffs would not deprive them of the right to hold them as against the Plaintiffs. But our case is that their advances were not so protected, and in support of this contention *Macnee* v. *Gorst* (1) is directly applicable. Then it is suggested that unless the Plaintiffs can shew that the Defendants were acting as brokers for them, or that there was any privity of contract or fiduciary relation between them, they cannot, on the authority of *New Zealand and Australian Land Company* v. *Watson* (2), succeed, or follow the proceeds of their property in the hands of the Defendants. But that case does not apply, as the goods represented by the documents of title in the hands of the Defendants existed *in specie* when the action was brought, and cannot be retained by them against the Plaintiffs as the owners, unless their title as pledgees is valid under the *Factors Acts*.

1881. Dec. 21. BACON, V.C.:—

The Plaintiffs are merchants carrying on business at *Singapore* and in *Paris*, which business, or at least that part of it which relates to the matters involved in this action, consists in importing *Singapore* produce to *London*. From the beginning of 1878 until May, 1880, the Plaintiffs employed a Mr. *Charles Meyer*, then of *London*, as their agent, and to him they consigned their goods for sale on their account. The Defendants are colonial brokers in *Mincing Lane*, and had been before, and were during the period before-mentioned, employed by *Meyer* as his brokers in buying and selling for him colonial produce of various kinds. They were, in the course of their transactions, in the habit of making advances to him on the security of goods and documents of title to such goods in the ordinary course of their business. The matters referred to in this action consist of four several transactions (hereafter to be more particularly mentioned) in which the Defendants made advances to *Meyer* on the security of bills of lading which had been transmitted to him by the Plaintiffs, and which at the time of such advances were in his possession. At the time of *Meyer's* premature death, in the month of May,

(1) Law Rep. 4 Eq. 315. (2) 7 Q. B. D. 374.

1880, he appears to have been largely indebted to the Plaintiffs and also to the Defendants on account of their respective dealings with him. The Defendants assert that they became entitled to the goods upon which they made their advances, and the proceeds of those goods, to the full amount of their advances. The Plaintiffs on the other hand insist that the Defendants did not and could not acquire any charge, pledge, or lien upon the Plaintiffs' goods under the *Factors Acts*, or otherwise, and further, that if the Defendants should be held entitled to any charge or lien an account should be taken, and that upon payment to the Defendants of the amount of such charge or lien the goods may be delivered to the Plaintiffs, and the produce of such of them as have been sold may be paid to the Plaintiffs.

The law upon the subject must, I think, be taken to be very clearly expressed in the statute 5 & 6 Vict. c. 39, and so much of the preceding statutes 4 Geo. 4, c. 83, 6 Geo. 4, c. 94, as is not repealed or controlled by the more recent Act (40 & 41 Vict. c. 39). For a long period the state of the law had been in a most unsatisfactory state as regards mercantile dealings, and now that it has undergone very great changes and improvements it may be said without irreverence that the former law was hardly creditable to British jurisprudence. The narrow and strict rules of the Common Law upon which the earlier decisions were founded, although those were in themselves just and not very inconvenient when applied to what may be called domestic dealings—to the sale of a flock of sheep or a waggon-load of corn in fair or market—were found to be inapplicable to a great variety of matters necessarily incident to the transactions which take place between merchants, and to present impediments to the free course of mercantile business, and therefore disadvantageous to the community. To remedy this inconvenience the *Factors Acts*, 4 Geo. 4, c. 83, and 6 Geo. 4, c. 94, were passed, and they were soon found to be insufficient, and especially with respect to advances made to agents or factors. For this reason the statute 5 & 6 Vict. c. 39, was passed, the title of which indicates its general object (an Act to amend the law relating to advances *bonâ fide* made to agents intrusted with goods).

His Lordship, after referring to sects. 1, 2, 3, of this Act,

C. A. 1883 KALTENBACH v. LEWIS. V.-C. B.

proceeded:—So that as the law stands under the declarations and enactments of the several statutes, the power of a factor or agent to pledge the goods of his principal as security for an actual advance is distinctly established, except only in cases where the contract is not *bonâ fide*, or with actual notice that the agent had no authority to make the pledge, or that he was acting *malâ fide* in so doing—or that the pledge was made to secure an antecedent debt from the factor to the pledgee. It is unnecessary to add that in any case of actual fraud the transaction would be merely vicious and void upon general principles wholly independent of the statutes. That this was the state of the law understood and contemplated by the Plaintiffs when this action was brought is evident from the statements in the claim and the references there made to the statutes. In order to take the case out of the protection of the statutes, the Plaintiffs state the terms on which they employed *Meyer*, and from which they conclude that *Meyer* never at any time had any property or interest in or charge upon the goods consigned to him, nor any authority to obtain any loan or advance upon the bills of lading or the goods —and that the Defendants well knew that they belonged to the Plaintiffs and were intrusted to *Meyer* as Plaintiffs' agent.

His Lordship, after referring to the statement of claim, proceeded:—It appears to me impossible to misunderstand these statements, or to doubt that they are framed deliberately and skilfully in point of pleading for the purpose of establishing against the Defendants a case which would not only deprive them of all the protection which the statute meant to confer upon such dealings as come within this purview, but would establish against them a case of misconduct and bad faith of a very gross kind and of flagrant dishonesty. And this being so, it is wholly unimportant that the Plaintiffs do not in very terms charge the Defendants with having acted fraudulently towards them. On the part of the Plaintiffs no direct evidence has been adduced of any of the facts thus asserted by them; but they rely upon the several dealings between *Meyer* and the Defendants, which are in evidence and not in dispute—and it has been argued on their behalf that the just conclusion to be drawn from such facts establishes the Plaintiffs' title to the right they claim, so that the

allegation of bad faith being disproved and displaced, the question to be decided becomes merely one of law. The Defendants have not been satisfied to leave the matter in that shape, but have been examined on their own behalf, and have been cross-examined at great length and with searching and minute interrogatories as well before the hearing as in open Court.

They are colonial brokers who have for many years carried and still carry on a very extensive business in the city of *London*, and no question has been raised as to their being persons of good repute. They have severally denied that they knew anything of the nature of the dealings between the Plaintiffs and *Meyer*, or that they knew that *Meyer* had no right to pledge the goods, the bills of lading for which he deposited with them, to secure the actual advances which they made to him. They deny that they acted in any of these transactions with *Meyer* as principals, or in any other manner than as brokers, or that their dealings with him were in any manner speculative, or that their accounts with him were settled by payment of differences only; but they say that each of the advances made by them was actually advanced in cash and upon the security of documents of title and bills of lading then in the hands of *Meyer*. The extensive correspondence which occurred during the transactions, and which forms the most important of the evidence, has been abundantly referred to and commented upon. The Defendants' books have been produced and minutely investigated by the Plaintiffs, and the Defendants' clerks have proved that the entries in such books truly represent the transactions which they record. It is necessary, therefore, now to consider the question of law on which the Plaintiffs mainly rest their claim, and which is in substance that the advances made by the Defendants to *Meyer* were in respect of antecedent debts due from *Meyer*. It appears that *Meyer* had at various times purchased shell-lac to a considerable amount through the Defendants as his brokers. The course of dealing in this commodity, as is proved in evidence, appears to be this: The goods being landed are deposited in warehouses, whereupon the warehouseman or wharfinger issues a document, which is called a "Warrant for goods deliverable by warrant and weight-note." Then the buyer of these goods is entitled to this warrant upon

C. A. 1883 KALTENBACH v. LEWIS. N.-C. B.

complying with the conditions of sale, and tendering to the holder the purchase-money less the amount of the deposit paid by him as specified in the weight-note within the period of the "prompt," *i.e.*, the 17th of December; after that date the warrant is sufficient to obtain delivery of the goods. Then the weight-note certifies the fact that the goods have been weighed, and it gives the particulars of them, and adds the conditions under which the holder of this note will be entitled to the delivery of the goods. "See the contract on the other side." The contract on the other side is this:—"Engage after receiving the deposit-money to deliver to . . . . or order, the warrant issued by the wharfinger of the within mentioned goods, paying for the same on or before the . . . day" (which is called the prompt day), "Should the delivery be required before the expiration of the prompt, this weight-note must be produced at the wharfingers, together with the warrants regularly indorsed, without which no delivery can take place, but after that date the warrant alone will be sufficient to obtain possession of the property, and the weight-note shall be of no validity whatever; the holder is authorized to inspect the goods."

There is then issued by the seller a weight-note, which states the particulars and price and amount of the goods purchased—the date of what is called "the prompt," that is the day on which the credit will expire, usually three months, and the amount of the deposit which must be paid by the buyer before he can obtain the weight-note. Having obtained the weight-note the purchaser can deal with it in any manner he may think fit during the interval between the payment of the deposit and the prompt day. He may sell the goods or he may borrow money on the weight-notes—may take advantage of any fluctuation in the market, and is in all respects the owner of the goods subject only to the payment of the remainder of the price, which payment he may make at any time he thinks fit in the interval.

In this condition, then, *Meyer* stood on the 6th of December, 1879, when the first of the transactions mentioned in this action took place. The letter of that date set out in the statement of claim was then written by him to the Defendants:

"Can you give me for three or four weeks as a loan for the 20th inst. £2000 against security for bills of lading and insurance

policy of 961 B. white *Singapore* pepper, *per Beaconsfield*, sold to you to arrive. I have some heavy deposits on shell-lac to pay you on Saturday next, about £2000 too."

The Defendants complied with this request, and handed to *Meyer* their cheque for £2000, as a security for which they received from him bills of lading for goods *per Beaconsfield*. On the same day they received from him a cheque for £2855 5*s*. 8*d*. The Plaintiffs insist that this amounted merely to an exchange of cheques, and that it was a payment by *Meyer* to them of an antecedent debt. It appears to me, on the contrary, that it is proved to have been a payment by *Meyer* in order to enable him to obtain the weight-notes for the shell-lac of which he had become the purchaser. The Plaintiffs insist that inasmuch as the Defendants might be liable to their undisclosed principals in case of *Meyer's* default upon the shell-lac dealings, such possible liability constituted an antecedent debt, but I am wholly unable to adopt that conclusion. Upon payment of the deposit the purchase was *pro tanto* completed, and the brokers retaining the warrants, not the weight-notes, were fully secured for all that remained unpaid on the contract for purchase. Nor can it be said that because *Meyer* intimated that his reason for borrowing upon the bills of lading was to enable him to pay the deposits, the transactions are united: on the contrary, it seems that they are wholly disconnected, as it was entirely at the option of *Meyer* in what way he thought fit to employ the money he borrowed.

Cases were referred to, of which *Macnee* v. *Gorst* (1) was most relied on, but in that case and in the others the grounds of the decision that the transaction was not within the protection afforded by the *Factors Acts*, was that there had been no actual present advance by the pledgee, and no equivalent received by the pledger, neither of which elements existed between them in this transaction. Three other transactions have been mentioned, and fully examined and discussed, in which the Defendants lent money, hard, real money, to *Meyer* upon bills of lading of cargoes by the ships *Antenor*, *Comus*, *Glen Callach*, *Lansdowne*, and *Soteria*, but although some of the details in each of those cases differ from those relating to the *Beaconsfield*, the principles of law applicable

(1) Law Rep. 4 Eq. 315.

C. A. 1883 KALTENBACH v. LEWIS. V.-C. B.

to each of them are identical. For this reason it is that I do not think it necessary to refer to them more particularly. It is alleged in the statement of claim that no advances were made by *Meyer* to the Plaintiffs against such consignments. The Defendants have stated, in their statement of defence, and by their evidence, that they had no notice or knowledge of any arrangement or agreement, or of the course of dealing between the Plaintiffs and *Meyer*, and no contradiction of their statements in this respect has been offered. They rely upon the protection afforded by the statute 5 & 6 Vict. c. 39, to persons making actual advances in good faith to a consignee intrusted with goods, and they rely also upon 4 Geo. 4, c. 83, s. 1, by which it is enacted that consignees shall be deemed and taken to be the true owners so far as to entitle the consignee of such goods to a lien thereon in respect of any money or negotiable security advanced or given by such consignee to or for the use of the person in whose name such goods were shipped. The statement in the claim that *Meyer* had made no advances to the Plaintiffs is plainly inaccurate, for it appears by the evidence of the Plaintiff *Kaltenbach* that *Meyer* had come under considerable advances to the Plaintiffs in respect of the goods consigned to *Meyer*. In one instance £2000 paid by *Meyer's* bankers, in two others by acceptances of like amount which he had at the Plaintiffs' instance procured a credit for upon his father in *Paris*, the benefit of which, by way of advance, the Plaintiffs had during the currency of the acceptances signed and renewed, although these acceptances were ultimately taken up by the Plaintiffs.

The Plaintiffs' case having failed, as in my opinion it does, upon the allegations that the pledges were made by *Meyer* to the Defendants in respect of differences occurring in speculations in which they were jointly interested, and that they were effectuated by a mere change of cheques with full knowledge by the Defendants of the Plaintiffs' rights, and full knowledge of the want of authority in *Meyer* to make such pledges—it remains only to be considered whether the Plaintiffs are entitled to such account as the statement of claim asks for in respect of the proceeds of the sale of goods *per Beaconsfield* and *Antenor*. The statement of claim and the defence both agree in stating that such goods have been sold and the proceeds received by the Defendants, who insist

upon their right to retain them on account of the large amount which remains due to them from the estate of *Meyer*. They allege that by the established custom of the trade in which they are engaged, they are so entitled to retain, giving credit in account current for all that they have received against the amount due to them by *Meyer*. And they further allege that when, after the proceeds of the *Beaconsfield* had been sold for £3600, *Meyer* requested them to pay him the balance of £1600, they refused to do so, insisting upon a right to retain it in respect of their subsequent advances, and that *Meyer* recognised such right and submitted to the Defendants' contention. If it were necessary or proper to decide this point it would be requisite that the matter should be more fully investigated, but the charges of *mala fides* being disproved, it cannot be said that there was any privity between the Plaintiffs and the Defendants, or that the latter were in any respect accountable to the former: *New Zealand and Australian Land Company* v. *Watson* (1). An account might no doubt be directed, in an action properly constituted, of the Defendants' dealings with *Meyer*, but not in the absence of the representatives of *Meyer;* the Plaintiffs having at most no other right than that of standing in the shoes of *Meyer*, and the account being of necessity subject to all the legal and equitable rights subsisting between *Meyer's* estate and the Defendants.

Under these circumstances, and finding, as I do, that all the Plaintiffs' charges of bad faith against the Defendants—which the Plaintiffs decline to call fraudulent, but to which I can give no other name—have failed, and being of opinion that none of the moneys paid by *Meyer* to the Defendants were in respect of antecedent debts, I am compelled to dismiss the action.

F. G. A. W.

C. A.

The Plaintiffs appealed, and the appeal was argued on the 2nd, 7th, and 8th of May, 1883.

Webster, Q.C., *Everitt*, Q.C., and *F. M. Abrahams*, for the Plaintiffs:—

We do not dispute that the Defendants have a lien on the

(1) 7 Q. B. D. 374.

C. A. 1883 KALTENBACH v. LEWIS.

Beaconsfield consignment for the £2000 which was specifically advanced upon it, and as regards the consignment by the *Antenor*, which was sold and the proceeds carried to account before *Meyer's* death, we admit that we have no claim. Now, as to the *Beaconsfield* cargo, which was sold, only a deposit was paid in *Meyer's* lifetime, the balance of purchase-money was not payable till June. *Lewis & Peat* claim to retain the balance as against their general account. As between them and *Meyer* they probably could do so, but not as against us. As between the Plaintiffs and *Meyer*, the goods could only be sold for cash, and the Defendants knew that they did not belong to *Meyer*, but if they did not know it, still we say that they could have no lien except for their specific advances. The only case relied on by the Vice-Chancellor against us was *New Zealand and Australian Land Company* v. *Watson* (1). That was a claim to have the benefit of contracts which had been entered into by the brokers, and it was held that the benefit of them could only be claimed subject to all equities existing between the parties to them. It was, therefore, held that the proceeds could not be followed after an account had been settled between the purchasers and the brokers.

[FRY, L.J.:—Is not this case similar in principle?]

No. We are not suing for the proceeds of sale, but for the goods. On the 12th of May we claimed to have the *Beaconsfield* cargo given up. At that time *Meyer* would have been entitled to claim it back on payment of £2000, and we have the same right. If valid contracts for sale had been entered into we should be bound to deliver to the purchasers on payment of the purchase-money, but that does not give the Defendants a right to retain the goods. The case of goods sold and paid for before *Meyer's* death, as had been done with the *Antenor* cargo, is quite different; there the proceeds could only be claimed by the consignor claiming the benefit of the contracts for sale. *Armstrong* v. *Stokes* (2) and *Elbinger Actien-Gesellschafft* v. *Armstrong* (3) illustrate the difference between the two cases. *Maspons* v. *Mildred* (4) deals with the former case.

(1) 7 Q. B. D. 374.
(2) Law Rep. 7 Q. B. 598.
(3) Law Rep. 9 Q. B. 473.
(4) 9 Q. B. D. 530.

[LINDLEY, L.J.:—I doubt whether the decision there would have been the same if *Demestre & Co.* had been an English house.]

The judgment also deals with the *New Zealand Case* (1), and points out the difference where the money is received, and a set-off made, before any claim by the consignors. We admit that if the transaction has resulted in a debt, and the debt has been passed in account before the consignor intervenes, he cannot claim either the goods or their proceeds. The Defendants have no lien on our goods for their general balance against *Meyer: Leuckart* v. *Cooper* (2). The pledges of the *Comus* and *Glen Callach* are not good, for there cannot be a good pledge under the *Factors Acts* for antecedent debts, *Macnee* v. *Gorst* (3), a case which is very analogous to the present, the debt for the shell-lac being an antecedent debt. *Jewan* v. *Whitworth* (4) is there explained; it turned on a *bonâ fide* advance, and the remarks in it were to be taken with reference to its circumstances. In *Learoyd* v. *Robinson* (5) a pledge which was a device for taking up existing bills was held not protected. It is quite contrary to principle that persons dealing with an English broker should set up a general lien against a foreign principal, and the Vice-Chancellor here did not go upon that, but on the ground that there were *bonâ fide* special advances.

Sir *F. Herschell*, S.G., *Davey*, Q.C., *Horton Smith*, Q.C., and *Northmore Lawrence, contrà*:—

The question is as to the legal position of the Plaintiffs as regards *Lewis & Peat*, and theirs as regards the Plaintiffs. We admit that there may be a difference of positions as to different parcels—a difference between goods sold before the Plaintiffs intervened and goods not sold till afterwards—that will have to be dealt with. The cargoes here fall into two classes—the first class comprising the *Beaconsfield* and *Comus*, the second class the other cargoes, except that of the *Antenor* as to which no question is now raised.

As to the first class of cargoes they were specifically sold before

(1) 7 Q. B. D. 374.
(2) 3 Scott, 521.
(3) Law Rep. 4 Eq. 315.
(4) Ibid. 2 Eq. 692.
(5) 12 M. & W. 745.

C. A. 1883 KALTENBACH v. LEWIS.

the Plaintiffs intervened, though only a deposit on the purchase-money had been received. The question as to them turns on *New Zealand and Australian Land Company* v. *Watson* (1). That case establishes that where an English merchant puts goods for sale into the hands of a broker, though the merchant acts for a foreign principal, there is no privity between the foreign principal and the broker, and if the goods are sold the principal can only claim the proceeds subject to the state of account between the broker and the English merchant. *Armstrong* v. *Stokes* (2) and *Hutton* v. *Bulloch* (3) illustrate the same rule. There is no question that here the goods were legally sold. The Plaintiffs then say, "Give us the proceeds because the goods are ours." The *New Zealand Case* says, "You can only step into the shoes of *Meyer*," and that is independent of any question under the *Factors Acts*. *Lewis & Peat* having sold the goods would have refused to give them up to *Meyer*, and would have been justified in so refusing, and the Plaintiffs are in no better position—they can only say, account to us for the proceeds on the same footing on which you would have accounted to *Meyer*. A distinction is attempted to be drawn between moneys received before and after the Plaintiffs intervened. There is no doubt some distinction between goods sold before and after that time, but we say there is none between goods then paid for and not then paid for. *Lewis & Peat* were under specific contracts to deliver the sold goods to the purchasers, and could not be called on to give them back. The contract for sale is the important matter, not the payment. The Plaintiffs could not claim the goods back, because they were legally sold before the Plaintiffs intervened. They have only the same claim to an account as *Meyer* had. The *Beaconsfield* sales took place on the 29th of November and the 8th of December, the advances were made on the 20th of December, and were in fact advances in anticipation and part payment of the purchase-money, so if *New Zealand and Australian Land Company* v. *Watson* is law the Plaintiffs must give credit for them. As regards the *Comus*, the advances thus made slightly exceeded the purchase-money, so no question arises as to the

(1) 7 Q. B. D. 374. (2) Law Rep. 7 Q. B. 598.
(3) Law Rep. 8 Q. B. 331; 9 Q. B. 572.

balance. As to the balance of the *Beaconsfield* purchase-money, we rely on the same case, which shews that the Plaintiffs can only stand in *Meyer's* shoes. *Lewis & Peat* can say to the Plaintiffs, "We knew nothing of you; we had goods on sale from *Meyer* and were entitled to give him credit."

Now as to the cargoes which had not been sold before the Plaintiffs intervened a distinction between them and goods sold is suggested in the *New Zealand Case* (1), and is commented on in *Maspons* v. *Mildred* (2).

[FRY, L.J.:—In *New Zealand and Australian Land Company* v. *Watson* (3) Lord Justice *Bramwell* says, "I agree that goods and the produce of goods may be followed." How is that to be understood?]

Looking at the context it is clear that the words "and the produce of goods" got in by mistake. The observations in *Maspons* v. *Mildred* (4) tend to shew that the distinction between goods sold and not sold is not sound.

[FRY, L.J.:—It is urged against you that the proceeds in the hands of the purchaser can be followed.]

That turns on this, whether the principal can claim the goods back on the terms of carrying out the contracts for sale.

[LINDLEY, L.J.:—Can you claim a lien on the proceeds for more than you can claim against the goods?

FRY, L.J.:—Do not goods and proceeds both belong to the principal?]

The money does not belong to the Plaintiffs; there is no debt to them from the purchaser. They can do no more than come into *Meyer's* place. If, however, the distinction between goods and proceeds is well founded, the Plaintiffs can only claim the proceeds subject to all prepayments made to *Meyer*. If we are wrong on that, then we say that these were good advances under the *Factors Acts*. It is contended that no present advance was made but credit given for an antecedent debt. Look, however, at the relation of the parties. *Lewis & Peat* had entered for

(1) 7 Q. B. D. 374.
(2) 9 Q. B. D. 530.
(3) 7 Q. B. D. 382.
(4) 9 Q. B. D. 530, 544, 545.

C. A. 1883 KALTENBACH v. LEWIS.

Meyer into a contract for shell-lac in a form which made them personally liable; still it was *Meyer's* contract and he could have been sued on it. He was liable on a particular day to pay a particular sum, and says to *Lewis & Peat* "You will have to pay £500 for me on a certain day, lend me £500 for the purpose on the security I will give you." If *Meyer* had not paid then *Lewis & Peat* could have completed the contract on their own account, and if the market had afterwards risen they could have retained the profit. If *Lewis & Peat* had disclosed *Meyer's* name so that he only could be sued, it would have been a clear case of present advance; and how can it make any difference that *Lewis & Peat* were liable to pay if *Meyer* did not; it still is an advance to enable him to pay. The Plaintiffs rely on *Macnee* v. *Gorst* (1). We do not dispute the decision on the facts of that case; but we say it does not lay down any principle which can decide the present case in the Plaintiffs' favour. In that case a person who was in the same position as *Meyer* here was, accepted a bill drawn by *Gorst*, and it was held a pledge subsequently made to *Gorst* to secure an antecedent debt. If in the present case *Lewis & Peat* had paid for the shell-lac out of their own moneys so as to make *Meyer* their debtor, then the case would have been parallel to *Macnee* v. *Gorst;* but as the facts were, there was no debt due to the person to whom the pledge is given, and if not, then according to the express words of the statute the case is not taken out of its protection. The pledges then are good under the *Factors Act* as to the cargoes by *Beaconsfield, Glen Callach, Lansdowne,* and *Soteria* respectively.

[FRY, L.J.:—Under the Act the pledge must be *bonâ fide.* Is it so if it is to discharge the private debt of the factor?]

Not if the person making the advance knows that it is to discharge the factor's private debt; but here *Lewis & Peat* knew nothing of the sort. The very object of the *Factors Act* was to preclude the necessity of making inquiries as to the authority of the factor. *Navulshaw* v. *Brownrigg* (2) shews the principles applicable to the case. *Meyer* might be acting as broker for undisclosed principals as to the shell-lac, or he might have made

(1) Law Rep. 4 Eq. 315. (2) 2 D. M. & G. 441.

advances on the goods which entitled him to pledge them. *Lewis & Peat* were not bound to inquire, and it would not be in the ordinary course of business to inquire. For anything that *Lewis & Peat* knew *Meyer* might be purchasing the shell-lac for the Plaintiffs.

Everitt, in reply:—

Portalis v. *Tetley* (1) recognises the right of a principal to withdraw goods at any time on satisfying any lien on them. There can be no lien for a general balance when the party claiming it knows that the person with whom he was dealing was only an agent: *Semenza* v. *Brinsley* (2).

June 4. LINDLEY, L.J., now delivered the judgment of the Court (*Baggallay*, *Lindley*, and *Fry*, L.JJ.):—

The Plaintiffs in this action are merchants carrying on business at *Singapore*. Their course of business was to consign foreign produce to *Charles Meyer*, a *London* merchant and commission agent, for sale on their account. He did not make advances to the Plaintiffs on the goods so consigned, but he accepted bills drawn by the Plaintiffs on him against such goods, and those bills were taken up by him if he had in his hands when the bills fell due sufficient funds of the Plaintiffs to take them up; whilst if he had not, the Plaintiffs themselves met the bills, or arranged for their renewal until the goods against which they had been drawn were sold. *Meyer* therefore never had any lien on the goods for advances made by him. The Defendants are *London* colonial brokers, and were employed by *Meyer* to sell the goods consigned to him by the Plaintiffs as above mentioned. The Defendants were also engaged in other transactions for *Meyer*, and made purchases and sales for him to large amounts. The Defendants made large advances to *Meyer*, and the Defendants allege that these advances were made upon an agreement or custom that they should have a general lien for all their advances to him on all goods and moneys for which they were accountable to him. *Meyer* died hopelessly insolvent on the 5th of May, 1880, and he was then greatly indebted both to the Plaintiffs and

(1) Law Rep. 5 Eq. 140. (2) 18 C. B. (N.S.) 467.

C. A. 1883 KALTENBACH v. LEWIS.

to the Defendants. At the time of his death the Defendants had in their possession various goods consigned by the Plaintiffs to *Meyer*, and placed by him in the hands of the Defendants for sale. Some of these goods had been agreed to be sold before *Meyer's* death, and the others have been sold since.

This action is brought by the Plaintiffs in order to recover the moneys arising from such sales. The action is defended on the ground that the Defendants are entitled to a lien or set-off for the whole amount of *Meyer's* indebtedness to them.

The controversy between the Plaintiffs and the Defendants relates to the right of the Defendants to retain as against the Plaintiffs the moneys arising from the sales by the Defendants as brokers for *Meyer* of goods consigned by the Plaintiffs to *Meyer* by the six under-mentioned ships, viz.: 1. The *Beaconsfield;* 2. The *Comus;* 3. The *Glen Callach;* 4. The *Soteria;* 5. The *Lansdowne;* 6. The *Antenor.*

The Plaintiffs' counsel raised no controversy on the appeal as regards the goods consigned by the *Antenor*, and they admitted that the Defendants were entitled to a lien under the *Factors Acts* for an advance of £2000 on the goods consigned by the *Beaconsfield* and for an advance of £200 on the goods consigned by the *Soteria* and *Lansdowne.* All other rights of lien or of set-off were however strenuously contested.

Without examining in detail the various documents and accounts which are in evidence, it is necessary to state shortly the results which we consider established. As regards the consignments by the *Beaconsfield, Soteria,* and *Lansdowne* there is no proof of any advances specifically on these goods beyond the £2000 and £200 already referred to, and there are balances in the hands of the Defendants after repayment of those advances arising from the sales of these consignments. As regards the goods consigned by the *Comus* and the *Glen Callach* the Defendants advanced £3000 and £800 specifically on them under the circumstances which will be mentioned presently, and if these advances are to be allowed to the Defendants there will be little or no balance in their hands arising from the goods *ex Comus,* but there will be a balance arising from the sale of the goods *ex Glen Callach.* The goods consigned by the *Beaconsfield* and by

the *Comus* were all agreed to be sold by the Defendants before *Meyer's* death, although only about £300 had been received by them in respect of such sales before that time. The goods consigned by the other vessels were in the Defendants' hands for sale but had not been sold before *Meyer's* death.

This action was commenced on the 14th of May, 1880, so shortly after *Meyer's* death that it is not necessary to distinguish between the dates of that event and of the assertion by the Plaintiffs of their claims against the Defendants. The advances of £3000 and of £800 made by the Defendants to *Meyer* on the goods *ex* the *Comus* and the *Glen Callach* respectively were the subject of much controversy. The facts relating to these advances are shewn by the evidence to be in substance as follows. The Defendants had bought for *Meyer* large quantities of shell-lac, and as between themselves and the vendors the Defendants were themselves liable to pay for it, whilst between themselves *Meyer* was the person liable to pay for this shell-lac. Before the time for payment arrived it was agreed between him and the Defendants that they should advance him the money necessary to pay for the shell-lac, and that he should then pay for it. This arrangement was carried out by the Defendants giving him cheques for the sums of £3000 and £800 in question, and by his paying for the shell-lac or putting them in funds to pay for it the next day. The Defendants gave these cheques for £3000 and £800 specifically on the security of the goods *ex Comus* and *ex Glen Callach* respectively. On the other hand, the Defendants knew that as to the consignment *ex Glen Callach*, *Meyer* was acting for a principal. Whether they knew that he was so acting with respect to the consignment *ex Comus* is not so clear.

The Plaintiffs, by their pleadings, disputed the Defendants' right to any lien or set-off whatever on the goods sold or on or against the moneys arising from their sale, and the Plaintiffs alleged that none of the advances made by the Defendants had been made by them *bonâ fide*, and, further, that all their alleged advances were in fact mere paper credits made in respect of speculations in which they had engaged with *Meyer*.

The Plaintiffs claimed relief on this footing, and although they also claimed, in the alternative, relief on the footing of taking an

C. A. 1883 KALTENBACH v. LEWIS.

account of what, if anything, might be due to the Defendants in respect of their *bonâ fide* advances against particular goods, if any such should be established, yet it is impossible to read the amended statement of claim without coming to the conclusion that the case really made by the Plaintiffs against the Defendants was that their advances were not *bonâ fide* but pretended, and that their dealings with *Meyer* were in the nature of speculations in foreign produce and settlements of differences in prices, and not purchases and sales as brokers for a merchant employing them in the ordinary course of business. The case so made by the Plaintiffs was completely abandoned by counsel before us, and it was then frankly admitted that no improper conduct was imputable to the Defendants, and further, that to the extent already mentioned as conceded, they had established a right to a lien under the *Factors Acts*. But it was contended that the advances of £3000 and £800 on the goods *ex Comus* and *ex Glen Callach*, before alluded to, were made in respect of antecedent debts and were not protected by the *Factors Acts*, and that except so far as the *Factors Acts* were applicable the Defendants had no right of lien or of set-off as against the Plaintiffs. The Defendants on the other hand contended that the advances alleged to be made in respect of antecedent debts were not in fact so made, and were protected by the *Factors Acts*, and that quite apart from the *Factors Acts* the Defendants were entitled to a lien or set-off for the whole amount due to them from *Meyer*. This last contention was based upon the ground that the Plaintiffs were undisclosed foreign principals and had no greater rights against the Defendants than *Meyer* himself would have had, and that if even this were not the case with respect to the goods unsold, it was the case as to the proceeds of goods sold before the Plaintiffs made any claim against the Defendants.

The Vice-Chancellor decided in favour of the Defendants, and dismissed the action with costs, mainly on the ground that the charges made by the Plaintiffs against the Defendants were unfounded, and that all the Defendants' advances were such as were protected by the *Factors Acts*. From this decision the Plaintiffs have appealed.

It will be convenient to dispose of the question which has been

raised respecting the advances of £3000 and £800 on the goods consigned by the *Comus* and *Glen Callach* before dealing with the other and more general questions which have to be determined. The Plaintiffs contend that these advances fall within sect. 3 of the *Factors Act*, 5 & 6 Vict. c. 39, and are not protected by the 1st section of the Act, and the Plaintiffs rely on *Macnee* v. *Gorst* (1) as an authority in their favour on this point. It is not necessary to discuss the correctness of the inferences of fact drawn by the Court from the evidence in that case. The Court came to the conclusion that, as a matter of fact, there was an antecedent debt due from the factor to the Defendants, and that the Defendants' advance was made to enable the factor to discharge that debt; and the whole of the reasoning of the Vice-Chancellor in *Macnee* v. *Gorst* proceeded upon this view of the facts. Now in the present case, although the factor *Meyer* was bound to indemnify the Defendants against the liability they had incurred by buying shell-lac for him, still he was not indebted to them in respect of such purchase when the advances in question were made. Those advances were not, in fact, in respect of any antecedent debt owing by him to them. If the Defendants had not been themselves liable for the price of the shell-lac, this part of the case would be too clear for controversy. The circumstance that they were so liable, and that the advance was made to enable *Meyer* by one and the same payment to discharge both their liability and his own, does not make their advance an advance from them to him in respect of a debt owing by him to them. It is true that if the Defendants had paid for the shell-lac, and so become creditors of *Meyer*, and had then made him an advance to enable him to repay them, the case would be undistinguishable from *Macnee* v. *Gorst*, but this is not what was done, and in this respect the two cases are not alike.

The question, however, still remains whether these advances were made *bonâ fide* and without notice that *Meyer* had not authority to pledge the goods for them; for unless they were, they will still fall within sect. 3 of the *Factors Act* (5 & 6 Vict. c. 39), and not be protected even although they may not have been made in respect of an antecedent debt. Now the Defendants certainly

(1) Law Rep. 4 Eq. 315.

C. A. 1883 KALTENBACH v. LEWIS.

knew what these advances were for—viz., to enable *Meyer* to pay for shell-lac which he had bought and for which the Defendants were liable, and the Defendants also knew, certainly as regards the goods *ex Glen Callach*, and perhaps as to goods *ex Comus*, that *Meyer* was selling for a principal. On the other hand, they did not know for whom he had bought the shell-lac, whether for himself, for the Plaintiffs, or for any other principal, and did not know in point of fact that he was exceeding his authority, or was acting *malâ fide* towards his own principals. Under these circumstances, we are of opinion that the advances in question ought to be treated as protected by sect. 1 of the *Factors Act*, and not as invalidated under sect. 3. The language of sects. 1 and 3 and the decision in *Navulshaw* v. *Brownrigg* (1), which is very valuable on the question of notice of excess of authority or *mala fides*, seem to us not only to warrant this conclusion but to require it. We moreover think it extremely important not to encourage the application of the equitable doctrines of constructive notice to honest mercantile transactions, and there being in this case no actual notice to the Defendants that *Meyer* was acting improperly towards his own principals, and no reason to believe that the Defendants were themselves acting otherwise than honestly in the ordinary course of business, we are of opinion that they are entitled to the protection of the *Factors Act* with respect to the advances of £3000 and £800, which we have been considering. This conclusion might seem to conflict with *Learoyd* v. *Robinson* (2), but in that case, as we understand it, the advance was not made in the ordinary course of business, but solely to enable the factor to take up a bill on which he and the defendants were liable. The advances in this case were, in our opinion, made *bonâ fide* in the ordinary course of business to enable *Meyer* to pay for goods which he had bought for some unknown principal; and, although the Defendants were themselves liable for those goods, we do not believe that, as a matter of fact, the advances in question were made solely to relieve the Defendants from that liability, and upon this ground the case differs from *Learoyd* v. *Robinson*.

There remains for consideration the right of the Defendants to retain the balances in their hands after repaying themselves the

(1) 2 D. M. & G. 441. (2) 12 M. & W. 745.

advances made expressly on the security of particular consignments, and which advances are protected by the *Factors Acts*. In other words we have to determine the right of the Defendants to retain the balances in their hands of the proceeds of the sale of the goods *ex Beaconsfield*, after retaining the advance of £2000; *ex Comus*, after retaining the advance of £3000; *ex Glen Callach*, after retaining the advance of £800; *ex Soteria and Lansdowne*, after retaining the advance of £200. The Defendants' right to retain these balances has to be considered first with reference to the *Factors Act*, and secondly independently of it.

The 1st section of the *Factors Act*, 5 & 6 Vict. c. 39, applies in terms to pledges not only for original advances on the security of goods, but also for any further or continuing advance in respect thereof; and the Defendants contend that all their advances to *Meyer* were made upon the terms that they were to be secured on all goods in their hands on his account. We have no doubt that the Defendants made all their advances to *Meyer* on the supposition that they would have a general lien of this kind, and they seem to rest their claim to such a lien partly on mercantile usage and partly on agreement with *Meyer*. The evidence, however, both of the alleged usage and of the alleged agreement is very slender, and we cannot hold either to be established in fact. Even if the evidence on this head had been stronger, *Leuckart* v. *Cooper* (1) shews that the usage could not prevail as the law then stood, and we should feel great difficulty in holding an agreement for a lien to be more effectual than a mercantile usage for such a purpose as that under consideration. In this respect the law does not appear to have been altered since *Leuckart* v. *Cooper* (2) was decided. The language of sect. 1 of 5 & 6 Vict. c. 39, seems carefully guarded, in order to exclude general liens from the protection given by the Act to original or subsequent advances in respect of goods pledged by factors; and there is good reason for such a distinction. Advances against particular goods are naturally limited by their value, but advances under an agreement for a general lien may far exceed the value of any particular goods. The *Factors Acts* expose the owner of goods to the risk of having to pay advances on them up to their value if they have been

(1) 3 Bing. N. C. 99. (2) 3 Scott, 521.

C. A. 1883 KALTENBACH v. LEWIS.

improperly pledged by his factor; but the *Factors Acts* protect him from the risk of having to pay advances not limited by their value. If we were to decide in favour of the general lien set up by the Defendants we should be exposing the owners of goods to risks far more extensive than the Legislature appears to us to have contemplated. We should, in fact, fail to give any practical effect to the words "in respect thereof" in sect. 1, and which words are all important. So far, therefore, as the *Factors Acts* are concerned, we hold the general lien relied on by the Defendants to be inadmissible as against the Plaintiffs.

We pass now to consider the question whether apart from the *Factors Acts* the Defendants can retain the balance in their hands after deducting the amounts of the liens they had acquired under the *Factors Acts*. The Defendants maintain that they are entitled to do so upon the authority of *New Zealand and Australian Land Company* v. *Watson* (1) and *Maspons* v. *Mildred* (2), both of which are recent decisions of this Court. Both of these cases turned on the right of foreign undisclosed principals to sue persons employed in this country by their agents to sell goods. In *New Zealand and Australian Land Company* v. *Watson* the plaintiffs had consigned goods to English *del credere* agents for sale. These agents employed the defendants to sell the goods, and the plaintiffs knew this. The defendants sold the goods and the agents having become insolvent the plaintiffs sued the defendants for the proceeds of the sale upon the theory that the plaintiffs had employed the defendants to sell. The jury found that this was not so in fact, and the Court decided, first, that the plaintiffs were not entitled to sue the defendants, and, secondly, that even if they were the plaintiffs were in no better position as regards the defendants than the persons who actually employed them. No question was raised with reference to the *Factors Acts* nor did the case turn on them. Neither did the plaintiffs in that case sue as owners of the goods, and as such entitled to them or the proceeds of their sale. But the Court alluded to this question and considered that the plaintiffs might have followed the goods and claimed them from the defendants before they had sold them, but that the plaintiffs could not after a sale follow and recover the

(1) 7 Q. B. D. 374. (2) 9 Q. B. D. 530.

proceeds except subject to such right of set-off as the defendants had against the agents who employed them. The distinction thus drawn between recovering the goods and their proceeds was commented on by the Court in *Maspons* v. *Mildred* (1), and it was there intimated that the right of the *New Zealand Land Company* to follow their goods was by no means clear. It is to be observed that in *New Zealand and Australian Land Company* v. *Watson* (2) the goods had been rightfully sold before their owner made any claim, and we do not see how under these circumstances the Plaintiffs in that action could have proceeded on any theory of following the goods. *Armstrong* v. *Stokes* (3) shews that they could not. The remarks in *Maspons* v. *Mildred* (4) on *New Zealand Land Company's Case* must be understood as applying to the facts of that case, and not as throwing doubt on the right of an owner of goods to follow them so long as they have not been properly sold. On looking at Lord *Bramwell's* judgment in *New Zealand and Australian Land Company* v. *Watson* (5), we think that the Court in *Maspons* v. *Mildred* must have misunderstood his observations and have been under the impression that he was speaking of following goods sold, which however he was not. *Maspons* v. *Mildred* itself has little, if any, direct bearing on the present case, but the Defendants contended that the combined effect of the decision in *New Zealand and Australian Land Company* v. *Watson* and the observations upon it in *Maspons* v. *Mildred* establish the following propositions, viz.:—

1. That the Plaintiffs in the present case cannot sue the Defendants at all; 2. That if they can they can only sue for the proceeds of the goods unsold by the Defendants when *Meyer* died; 3. That even in respect of these the Plaintiffs are in no better position than *Meyer* himself, and that all rights of set-off available against him are equally available as against the Plaintiffs. If these propositions were well-founded, it seems to us that the *Factors Acts* will practically have ceased to have any application to foreign principals consigning goods to this country for sale; for, if the Defendants are right in their contention, it will follow

(1) 9 Q. B. D. 530.
(2) 7 Q. B. D. 374.
(3) Law Rep. 7 Q. B. 598.
(4) 9 Q. B. D. 545.
(5) 7 Q. B. D. 382, 383.

C. A. 1883 KALTENBACH v. LEWIS.

that the protection afforded by those Acts to foreign merchants will have been destroyed by modern decisions, and that the limited protection given by those Acts to persons making advances to factors of foreign merchants will have been practically replaced by an unlimited protection given by judicial authority to all persons making advances to such factors or otherwise becoming their creditors. This would certainly be a somewhat startling consequence, and the more so as the decisions alluded to did not proceed on the *Factors Acts* or involve any consideration of them.

These observations are sufficient to shew that the Defendants' contention cannot be supported to its full extent, but it is necessary to consider how far, if at all, it is well founded, and what the real principles are which ought to be applied to cases of this description.

First, then, as to the Plaintiffs' right to sue the Defendants in respect of the goods *ex Beaconsfield* and *ex Comus*, which were sold by them before *Meyer's* death. These goods were consigned by the Plaintiffs to him for sale; they were properly sold by the Defendants by his orders, and the Plaintiffs could not either prevent delivery of the goods or recover them from the purchasers. The proceeds of sale became a debt owing by the Defendants to *Meyer*, and he could have sued the Defendants for such debt; but they could have successfully set off against his demand all debts owing by him to them. By our law the Plaintiffs, being a foreign house, cannot sue the Defendants for this debt; or, if they can, they can only sue them as representing *Meyer* and subject to all rights of set-off available against him. *New Zealand and Australian Land Company* v. *Watson* (1) appears to us conclusive on this point, and although, as pointed out in *Maspons* v. *Mildred* (2), the doctrine relating to undisclosed foreign principals, and their inability to sue on contracts made by their English agents were thereby somewhat extended, we consider ourselves bound by the decision in *New Zealand and Australian Land Company* v. *Watson*, and we are unable to distinguish it from this case. As regards, therefore, the proceeds of the sale of the goods consigned by the *Beaconsfield* and *Comus*, the Plaintiffs' claim wholly fails,

(1) 7 Q. B. D. 374. (2) 9 Q. B. D. 530.

and the Defendants are not driven to rely on the *Factors Acts*. If they were, they would still be entitled to succeed to the extent of their advances of £2000 and £3000, as already pointed out.

Lastly, we have to consider the proceeds of the sale of the goods *ex Soteria*, *Lansdowne*, and *Glen Callach*, all of which goods were unsold when *Meyer* died. On these goods the Defendants had, as already pointed out, a lien under the *Factors Acts* for £200 and £800 respectively, and we are unable to see that they can retain the balances arising from the sales of these goods after reimbursing themselves those advances. The Plaintiffs, being the owners of these goods, were entitled to have them redelivered to them by the Defendants on payment of the advances for which they had liens. This right has never been released or extinguished; and it was, in effect, asserted before the sales took place. The sales having taken place, the Plaintiffs are entitled to sue the Defendants for the value of the goods sold or for the proceeds of their sale, and the Defendants have no defence to such a claim except under the *Factors Acts*. *New Zealand and Australian Land Company* v. *Watson* (1) has no application to such a case as this. The Defendants' counsel, it is true, relied on the observations on that case made in *Maspons* v. *Mildred* (2), already alluded to, as affording an answer to the Plaintiffs' claim even to these unsold goods, but, as already pointed out, those observations are inapplicable to the case of unsold goods, and were never intended to apply to them.

The present case may, in our opinion, be shortly summed up in the following manner. First, a person receiving goods from an agent can acquire from the agent (1) all such title as the agent had in the goods by reason of lien for advances or otherwise; (2) all such title as the agent had express authority to create; and (3) all such title as the agent had authority to create by the law or custom of the country where the agency is to be exercised; but, as a general rule, the person taking such goods can get no better title than one or other of them. Here *Meyer* had no interest in the goods by reason of advances; he had no express authority to pledge the goods for his own debt; no custom has been proved authorizing him so to do even if it were

(1) 7 Q. B. D. 374. (2) 9 Q. B. D. 530.

C. A. 1883 KALTENBACH v. LEWIS.

valid: and consequently the Defendants only title as regards the goods is under the *Factors Acts*. Secondly, although an agent authorized to receive money for a disclosed principal can only validly receive it in cash and disengaged from any other relations between payer and payee, an agent for sale authorized to employ in his own name a broker or other sub-agent in effecting the sale may be satisfied by set-off or in any other manner in which a debt may be discharged as between the agent and sub-agent. Here *Meyer* was authorized to employ the Defendants in his own name, and they are therefore entitled to satisfy by set-off the debt arising from the sale of the Plaintiffs' goods during *Meyer's* lifetime. Thirdly, that the authority given by *Meyer* to the Defendants to sell the goods was withdrawn by his death and the commencement of this action, and consequently that in respect of the moneys arising from the sales subsequent to these events the Defendants have no right of set-off. The Plaintiffs are, therefore, entitled to the moneys produced by the sale of the goods consigned by the *Soteria*, *Lansdowne*, and *Glen Callach*, after deducting from those moneys respectively the sums of £200 and £800 advanced by the Defendants on these goods respectively. As regards the claim of the Plaintiffs to the proceeds of the goods consigned by the *Beaconsfield*, the *Antenor*, and the *Comus*, the action must be dismissed. Having regard to the unfounded charges in the statement of claim and to the failure of the Plaintiffs to establish their case except to a comparatively small amount, they must pay the costs of the action up to and including the trial, and each party must pay his own costs of the appeal. The Vice-Chancellor's judgment must be varied accordingly, and an account must be directed in order to ascertain the amount due to the Plaintiffs in respect of the moneys produced by the sale of the goods consigned by the *Soteria*, *Lansdowne*, and *Glen Callach;* and the further consideration of the action and the subsequent costs must be reserved.

Solicitors for Plaintiffs: *Michael Abrahams & Co.*
Solicitors for Defendants: *Hollams, Son, & Coward.*

H. C. J.

In re ROMFORD CANAL COMPANY.

POCOCK'S CLAIM.
TRICKETT'S CLAIM.
CAREW'S CLAIM.

KAY, J.

1883

June 2, 4, 15.

Company—Companies Clauses Consolidation Act, 1845—*Debentures—Irregularity in Issue—Transferee for Value without Notice—Estoppel.*

Where a company has power to issue legally transferable securities an irregularity in the issue cannot be set up against even the original holder if he has a right to presume *omnia rite acta*. If such securities be legally transferable such an irregularity and *à fortiori* any equity against the original holder, cannot be asserted by the company against a *bonâ fide* transferee for value without notice. Nor can such an equity be set up against an equitable transferee, whether the securities were transferable at law or not, if by the original conduct of the company in issuing the securities or by their subsequent dealing with the transferee he has a superior equity. If the original conduct of the company in issuing debentures was such that the public were justified in treating it as a representation that they were legally transferable, there would be an equity on the part of any person who had agreed for value to take a transfer of these debentures to restrain the company from pleading their invalidity, although that might be a defence at law to an action by the transferor.

A company having, subject to the conditions in the *Companies Clauses Consolidation Act*, 1845 (8 & 9 Vict. c. 16), the power of borrowing, issued, after resolutions passed at a meeting at which an insufficient number of shareholders were present, debentures to the contractor *J. B. P.*, who was present at the meeting and knew of the irregularities of the company.

J. B. P. transferred some of the debentures to *Y.*, a sub-contractor, for a nominal consideration, and some to *C.* for value.

Y. had a bill against *J. B. P.*, and *P.* discounted it and took as security a deposit of some of the debentures which had been registered in the name of *J. B. P.* These debentures were not transferred to *P.* and the transfer to *Y.* was not registered.

T. took a transfer of other debentures from *Y.* for a nominal consideration which had not been registered in the name of *J. B. P.*, but the transfer to *Y.* had been registered and *T.* alleged that he gave value to *Y.* Registration of the transfer to *T.* was refused. He brought an action against the company for payment and for registration, but it was stopped by the winding-up. *C.* had a transfer for full value and registered:—

Held, that *C.* had a valid claim to be paid his debentures, and that the company were estopped from setting up the irregularity in the issue of them.

Held, also, that *P.* and *T.* must be treated as equitable transferees only,

KAY, J.

1883

In re ROMFORD CANAL COMPANY.

POCOCK'S CLAIM.

TRICKETT'S CLAIM.

CAREW'S CLAIM.

but without reason to suspect any irregularity in the issue, and that they could be allowed to recover only such a sum as each of them might be able to prove he *bonâ fide* advanced upon the securities which he received.

ADJOURNED SUMMONS.

The *Romford Canal Company*, which was incorporated in 1865, had the power of borrowing money on debentures, subject to the conditions of the *Companies Clauses Consolidation Act*, 1845 (8 & 9 Vict. c. 16), s. 38, *et seq.*, and the proper certificate of a justice that the power had arisen seemed in this case to have been obtained, which by sect. 40 of the Act was sufficient evidence.

On the 28th of April, 1876, at a meeting of the company, at which two directors and two shareholders besides the contractor, *James Benjamin Parker*, were present, a resolution was passed authorizing the borrowing on debentures, but the resolution was invalid because a quorum of shareholders was not present at the meeting. It was said that the minutes were read and confirmed at a subsequent meeting held on the 18th of May, but the minutes of that meeting were not signed by the chairman, and it seemed that at that meeting also there was no quorum. All the debentures in question in these cases were issued to the contractor, and were by him transferred in *Pocock's* case and in *Trickett's* case to *Yeoman*, a sub-contractor, for a nominal consideration, and in *Carew's* case they were transferred by the contractor direct to *Carew* for value.

Pocock discounted *Yeoman's* bill upon the contractor for £300, and took as his security a deposit of the debentures upon which he made a claim, but they were not transferred to him. These debentures were registered in the name of the contractor, but the transfer of them to *Yeoman* was not registered.

In *Trickett's* case the debentures were never registered in the name of the contractor, but the transfer to *Yeoman* was registered and *Trickett* took a transfer from him, it being expressed to be in consideration of 5*s*. Registration of the transfer was on that ground as stated refused. In June, 1879, *Trickett* brought an action against the company for payment of the amount appearing to be due on the debentures and claiming that the company should register the transfer to him, and claiming also the appoint-

ment of a receiver and further relief. The action was stopped by the winding-up order, and which was made on the 24th of February, 1882. *Trickett* stated that these debentures were first deposited with him by way of equitable mortgage for value, and afterwards transferred.

In *Carew's* case, the precaution was taken by him to obtain under section 40 of the *Companies Clauses Consolidation Act*, 1845, the justice's certificate and a certified copy of the resolution to issue the debentures, and the transfer to him was for full value, and such transfer was duly registered.

In the winding-up the liquidator had certified that as the meetings which authorized the issue of the debentures were not duly held, the debentures had been illegally issued and were invalid, and this was a summons adjourned into Court asking in effect that the claims made by the three persons above-named should be allowed.

Charles Walker, for *Pocock*, after stating the facts and referring to the cases of *Royal British Bank* v. *Turquand* (1); *Agar* v. *Athenæum Life Assurance Society* (2); *Prince of Wales Assurance Society* v. *Athenæum Life Assurance Society* (3); *Dickson* v. *Swansea Vale and Neath and Brecon Junction Railway Company* (4); and *Fountaine* v. *Carmarthen Railway Company* (5); and *Lindley* on Partnership (6); submitted that the company was estopped from setting up the irregularity of the issue of the debentures, and that the claimant had an equity as against the company to call for completion of his legal title by having registration of the transfer. He had not been fixed with any notice of the absence of the formality of registration. It was the duty of the liquidator who alleged illegality to prove it. The *onus* was upon him and not upon the claimant.

Northmore Lawrence, for *Trickett*, said that he relied upon the decision in *Fountaine* v. *Carmarthen Railway Company* (7). The debentures were not choses in action, but legal bonds assign-

(1) 5 E. & B. 248; 6 E. & B. 327.
(2) 3 C. B. (N.S.) 725.
(3) Ibid. 756, n.
(4) Law Rep. 4 Q. B. 44.
(5) Ibid. 5 Eq. 316, 320.
(6) Page 880, last Ed.
(7) Law Rep. 5 Eq. 316.

KAY, J.
1883
In re ROMFORD CANAL COMPANY.
POCOCK'S CLAIM.
TRICKETT'S CLAIM.
CAREW'S CLAIM.

able at law, *Companies Clauses Consolidation Act*, 1845, sect. 46. The certificate of the justice was sufficient to shew that the debentures were good. That was material in this case, as the transfer to *Yeoman* was registered under sect. 47, and *Trickett* had a proper transfer from him for value, without notice of any irregularity in regard to the issue. The claim of *Trickett*, upon all the facts, should, he submitted, be supported as being perfectly good. The cases of *Webb* v. *Commissioners of Herne Bay* (1), and *Brunton's Claim* (2), were also in point.

[KAY, J., referred to *Landowners' West of England and South Wales Land Drainage and Inclosure Company* v. *Ashford* (3).]

The company having held out to all the world that *Yeoman* had a proper transfer, and he having transferred to *Trickett*, the company could not legally or equitably say he was not the owner of the debentures.

W. D. Rawlins, for *Carew*, who was a registered transferee for full value without notice of any irregularity, and who took all precautions to obtain evidence that the borrowing powers had been properly certified before the resolution was passed, submitted that he certainly had a good legal title: *Judicature Act*, 1873 (36 & 37 Vict. c. 66, sect. 25, sub-sect. 6), and the company was, without doubt, estopped in his case from setting up objections to the original title of the assignor. He referred to *In re South Essex Estuary Company* (4); *Hulett's Case* (5); *Vertue* v. *East Anglian Railway Company* (6); submitted that the case of *Webb* v. *Commissioners of Herne Bay* was on all fours with this case, and the claim should be allowed.

Haldane, for the liquidator:—

The meeting at which the resolution was passed to issue these debentures was not properly held, and the contractor who was one of the few persons present, was affected with notice that it was improperly held. He knew of all the circumstances under which the debentures were issued, and he knew that they were

(1) Law Rep. 5 Q. B. 642.
(2) Ibid. 19 Eq. 302.
(3) 16 Ch. D. 411.
(4) Law Rep. 11 Eq. 157.
(5) 2 J. & H. 306.
(6) 5 Ex. 280.

issued fraudulently, and before sufficient shares had been subscribed for. The debentures were issued for works which were never done. Though there is no evidence that *Carew* is affected with notice, yet the debentures in his hands he cannot prove upon. *Pocock* and *Trickett* are affected with notice of the irregularities which took place—that the capital had not been subscribed for; and that the justice's certificate was improperly obtained. The transferees who took from the transferor, the contractor, who had knowledge of the fraud, stand in no better position than he did. It is clear that there has not been a proper compliance with the 47th section of the *Companies Clauses Consolidation Act*, 1845, nor, so far as *Carew* is concerned, with the 18th section of the Act. These debentures must be subject to all equities between the company and the contractor. *Athenæum Life Assurance Society* v. *Pooley* (1); *In re Natal Investment Company* (2). The company having no power to issue the debentures, the certificate which was obtained was a nullity: *Peirce* v. *Jersey Waterworks Company* (3). The case of *Webb* v. *Commissioners of Herne Bay* (4) turned upon the doctrine of estoppel, and here the company cannot be estopped from setting up anything which was *ultrà vires*. The summons should be dismissed with costs.

C. Walker, *Northmore Lawrence*, and *W. D. Rawlins*, were heard in reply.

1883. June 15. KAY, J.:—

I have in this case to deal with three claims which have been made in the winding up of this company by persons professing to be entitled to debentures of the company, or, in the alternative, to some pecuniary payment in respect of debts for which such debentures purported to be given.

[After stating the facts as above set forth, his Lordship proceeded:—]

I think *Carew's Case* is covered by the decision in *Webb* v. *Commissioners of Herne Bay*, and that the company are estopped

(1) 3 De G. & J. 294. (3) Law Rep. 5 Ex. 209.
(2) Law Rep. 3 Ch. 365. (4) Ibid. 5 Q. B. 642.

KAY, J.
1883
In re ROMFORD CANAL COMPANY.
POCOCK'S CLAIM.
TRICKETT'S CLAIM.
CAREW'S CLAIM.

from setting up against him the irregularity in the issue of these debentures, which must be treated as valid in his hands for all purposes. The real difficulty arises in the other two cases. The contractor having been present when the resolution for issuing debentures was passed, must be taken to have known that such resolution was invalid. Then his assignments to *Yeoman* purport, on the face of them, to be in consideration of 5*s.* only, and therefore it is said that *Yeoman*, not being a purchaser for value, can be in no better position than the contractor, and *Pocock* and *Trickett* not having complete legal transfers it was argued that no estoppel arises in their favour. On the other side it was argued that there is such estoppel, because *Pocock* and *Trickett* have an equity as against the company to call for completion of their title by registration. It was urged that it sufficiently appears that the very purpose of issuing these debentures was to enable the contractor to raise money upon them to finance the company, and this having been carried out by debentures which, on the face of them, purport to be assignable, and which, if regular, would be transferable at law, the company are not now at liberty to assert the invalidity of these debentures as against *Pocock* and *Trickett*, who have advanced their money *bonâ fide* without notice of any irregularity. I must infer, from the minutes and the other evidence before me, that these debentures were issued by the company to the contractor for the purpose of raising money upon them. Assuming that the contractor paid nothing to the company for the debentures, which was probably the case, though, on the face of them, they purport to have been issued for full consideration, the object was that he should go into the market and induce other persons to advance money upon them for the purposes of the company. In *Dickson* v. *Swansea Vale and Neath and Brecon Junction Railway Company* (1) an equitable transferee of a money bond was held entitled to recover upon it against the company without regard to an equity which might have prevailed between the company and the original holder of the bond, because the bond had been given for the purpose of raising money upon it, and therefore the transferee, who had advanced money, had a superior equity. It was held, in effect, that if an action had been

(1) Law Rep. 4 Q. B. 44.

brought in that case in the name of the obligee, the defence would have been equitable, and the replication would have shewn that the equitable transferee of the bond had a better equity. The same point was decided in *In re Blakely Ordnance Company* (1). In this case, if the action had been in the contractor's name, or in that of *Yeoman*, the suggestion is that the company would have had a legal defence against which an equitable replication would not have been available. Would there have been a defence at law? To an action by the contractor there would, because he knew the issue was irregular. To an action by *Yeoman* as to the debentures not registered in his name, the same defence would have been an answer. As to those which were registered in his name there is more doubt, but I think I must take it that *Yeoman* gave no valuable consideration for these debentures, and that the legal invalidity of them could be effectively pleaded against him. Then the point of difficulty is this: Suppose an action brought by *Pocock* or *Trickett* in the name of the contractor or sub-contractor, and that a plea were put in of the legal invalidity of the debentures, would there, under the old practice, have been an equity to support a bill in Chancery for an injunction to restrain the company from insisting upon such a plea. In *Higgs* v. *Northern Assam Tea Company* (2) the facts were very similar. Certain debentures in the form of bonds payable to *Higgs*, his executors, administrators, or assigns, were secured by a covering mortgage (3) expressed to be for the benefit of the "holders for the time being" of these debentures, and Baron *Bramwell*, who delivered the judgment of the Court, pointed out that the defence to an action by the original owner was a legal set-off, and considered whether there was an equity to restrain such a plea. There might be, he intimated, either from the conduct of the company in originally issuing the debentures in such manner as to induce the belief that they were legally transferable, or if they had by their subsequent conduct recognised the particular transfer, both of which circumstances concurred in that case. The decision of Lord *Cairns*, L.C., in *In re Natal Investment Company* (4), which some lawyers appear to have been puzzled to

(1) Law Rep. 3 Ch. 154.
(2) Ibid. 4 Ex. 387.
(3) Law Rep. 4 Ex. 392.
(4) Ibid. 3 Ch. 355.

KAY, J.
1883
In re ROMFORD CANAL COMPANY.
POCOCK'S CLAIM.
TRICKETT'S CLAIM.
CAREW'S CLAIM.

reconcile with other cases, is explained in *Ex parte City Bank* (1), in a way which to my mind is very satisfactory. The instrument there in question was a money bond, and the words used in it were only equivalent to the word "assigns" which occurs in every money bond, and is never understood to represent that it is assignable at law but only in equity, and therefore only transferable subject to equities, but Lord *Cairns* did not decide that if an instrument is issued purporting to be legally assignable, and which the public have a right to believe to be so, the company can maintain an equitable defence which they might have against the original owner so as to defeat the claim of an equitable transferee for value. Thus understood the case is identical with *Athenæum Life Assurance Society* v. *Pooley* (2). In neither case was there any intimation by the company that the instrument was transferable at law.

I understand the law as at present settled, or perhaps I should rather say developed, thus: Where a company have power to issue securities, an irregularity in the issue cannot be set up against even the original holder if he has a right to presume *omnia rite acta*: *Fountaine* v. *Carmarthen Railway Company* (3). If such security be legally transferable, such an irregularity, and, *à fortiori*, any equity against the original holder, cannot be asserted by the company against a *bonâ fide* transferee for value without notice: *Webb* v. *Commissioners of Herne Bay* (4). Nor can such an equity be set up against an equitable transferee, whether the security was transferable at law or not, if by the original conduct of the company in issuing the security, or by their subsequent dealing with the transferee, he has a superior equity: *In re Agra and Masterman's Bank* (5); *In re Blakely Ordnance Company* (6); *Dickson* v. *Swansea Vale and Neath and Brecon Junction Railway Company* (7). There remains the present case, in which I must treat the parties as equitable transferees only of securities, which the company, having power to issue such, represent on the face of them to be legally transferable, and where the company would be

(1) Law Rep. 3 Ch. 758.
(2) 3 De G. & J. 294.
(3) Law Rep. 5 Eq. 316.
(4) Law Rep. 5 Q. B. 642.
(5) Ibid. 2 Ch. 391.
(6) Ibid. 3 Ch. 154.
(7) Law Rep. 4 Q. B. 44.

able to plead at law against the original holder or the first transferee, that the debentures were invalid because issued by an insufficient meeting of shareholders.

I think the decision of *Higgs* v. *Northern Assam Tea Company* (1) warrants me in saying that if the original conduct of the company in issuing these debentures was such that the public were justified in treating it as a representation that they were legally transferable, there would be an equity on the part of any person who had agreed for value to take a transfer of these debentures to restrain the company from pleading their invalidity, although that might be a defence at law to an action by the transferor. I am only considering a case in which the company had power to issue debentures which would be transferable at law, and where the equitable transferee had no reason to suspect any irregularity in the issue. It seems to me that both *Pocock* and *Trickett* are in this position, and that each of them has this equity against the company. But their rights being only equitable, relief must be given to them on equitable terms.

In my opinion they ought to be allowed to recover, not the nominal amount of the debentures, but only such sum or other valuable consideration, not being greater than that amount, as each of them may be able to prove he *bonâ fide* advanced or gave upon the security of the debentures he received. But this proof must be allowed to them in the character of debenture-holders, and with all the advantages attaching to that position, *pari passu* with other debenture-holders.

The costs in each case must be added to the debt. If no debt is proved the summons must be dismissed with costs.

Solicitors: *T. R. Kent; Munns & Longden; Clarke, Rawlins, & Co.; Haynes & Clifton.*

(1) Law Rep. 4 Ex. 387.

T. F. M.

KAY, J.
1883
July 3, 13.

In re COCKCROFT.
BROADBENT *v.* GROVES.

[1881 C. 5028.]

Will—Devise of Realty contracted to be purchased—Unpaid Purchase-money—Vendor's Lien—Locke King's Acts and Amendment Act (40 & 41 *Vict. c.* 34) *—Rights of Devisees—Compromise—Rescission of Contract.*

A testator who had contracted to purchase real estate, and paid the deposit money, by will made in 1881, specifically devised such real estate to his daughter for life, with remainder to her children, without shewing any intention that the purchase-money should be paid out of his personal estate; and he died without having disposed of his personal estate, which was rather less in amount than the unpaid purchase-money, and without having completed the purchase or paid any further part of the purchase-money.

After his death an action by the vendor against the executor and trustee of the will for specific performance of the contract was compromised by the Defendant thereto, and the contract was put an end to upon the terms that the vendor should retain the deposit money and have his costs; and this compromise was confirmed by the Court by an order made by consent in an administration action in the presence of the tenant for life of the real estate and the trustee, all the remaindermen being infants.

Upon the further consideration of the administration action, the devisees contended that they were entitled to so much of the personal estate as was equivalent to the unpaid purchase-money, upon the ground that the purchase was a conversion by the testator of his personal estate to that extent, and that *Locke King's Acts* had not altered the law in that respect:—

Held, that there was a vendor's lien, and that *Locke King's Acts Amendment Act* applied; that accordingly all the devisees were entitled to was the real estate charged with the unpaid purchase-money, and therefore on the facts to nothing; but *held*, moreover, that the order of compromise would be fatal to their claim, if otherwise good.

FURTHER CONSIDERATION of administration action.

The testator, *John Cockcroft*, by his will dated the 3rd of August, 1881, gave and devised to the Plaintiff *Broadbent* and one *Wood*, their heirs, executors, administrators, and assigns, "all his real estate, consisting of nine dwelling-houses and their appurtenances, situate in or near to *Charles Street, Quarry Hill, Leeds*, and then or late in the occupation of" certain persons therein named; also he gave and devised to the Plaintiff and *Wood* and their heirs, executors, and administrators, all his personal property

and securities for money, to hold to the Plaintiff and *Wood*, and their heirs, executors, and administrators, according to the several natures thereof respectively, upon trust to receive the rents of his real estate and let and relet the houses from time to time, and after keeping the property in good repair and paying interest on mortgage, and paying his trustees and executors for their time in looking after and repairing the property, and for collecting the rents, the said testator willed and declared that his trustees and executors should pay the surplus or remainder to his daughter, the Defendant *Mary Ann Groves*, during her life by two half-yearly payments, and after her decease he gave and devised the said real estate to all the children of his said daughter in equal proportions, share and share alike, as tenants in common, and not as joint tenants. And the said testator willed and declared that his trustees and executors should have full power to sell his real estate, or any part of it, at any time, either by public auction or private contract, and their receipt or signatures to be a sufficient discharge to any purchaser or purchasers, and to invest the money on mortgage or Government security, and after paying expenses to pay the interest to his said daughter, and after her decease he directed the interest to be paid towards the support and maintenance of all the children of his said daughter, and the principal to be paid to them in equal shares and proportions when the youngest child should attain the age of twenty-one years. And the said testator gave certain pecuniary legacies, including a legacy to his wife, the Defendant *Emma Cockcroft*, of £5, and appointed the Plaintiff and *Wood* trustees and executors of his will.

The testator died on the 8th of August, 1881. *Wood* disclaimed, and the will was proved by the Plaintiff. The testator left his wife, the Defendant *Emma Cockcroft*, and three daughters, namely, the Defendant *Mary Ann Groves*, and two others, both of whom were infants.

Before the date of his will the testator had contracted to buy from one *Watson* the nine dwelling-houses mentioned in the will for £580, and had paid a sum of £50 by way of deposit. But the contract had not been completed, nor any further sum paid by him at the time of his death.

KAY, J.
1883
In re COCKCROFT.
BROADBENT *v.* GROVES.

He had no other real estate, and his personal estate consisted of a sum of £470 cash on deposit at a bank, and certain household furniture and effects; and he was also entitled to a sum of £30 owing upon a promissory note.

This action was brought in September, 1881, against *Alfred Groves* and *Mary Ann Groves*, his wife, and *Emma Cockcroft*, and an administration order was made therein in March, 1882, which order, as the testator had not declared any trusts of his personal estate, comprised an inquiry who were his next of kin according to the statutes.

In February, 1882, *Watson* (the vendor) brought an action against *Broadbent*, the Plaintiff in this action, for specific performance of the contract entered into by the testator. This action was compromised upon the terms that the contract should be rescinded, and that *Watson* should retain the deposit of £50 and be paid his costs. And this compromise was sanctioned by an order made in this action on the 25th of April, 1882.

The next of kin of the testator at the time of his death were his widow and three surviving children, of whom *Mary Ann Groves* had since died, leaving the Defendant *Alfred Groves* (her legal personal representative), and certain infant children her surviving.

This action now came on upon further consideration, and the question was whether the devisees of the real estate were, as against the next of kin claiming the undisposed of personalty, entitled to so much of the personal estate of the testator as was equivalent to the unpaid purchase-money.

Warrington, for the Plaintiff, submitted the case to the Court.

Decimus Sturges, for the Defendant *Emma Cockcroft*:—

I admit that where there is a binding contract at the death of the testator it works conversion: *Hudson* v. *Cook* (1). But assuming that the fund, which is in the form of money, is in equity real estate, that real estate has not been paid for. The operation of *Locke King's Act*, therefore, is to restore the fund as personalty to the persons entitled under the intestacy, so that

(1) Law Rep. 13 Eq. 417.

one-third of it comes back to the widow. The lien for the unpaid purchase-money is a "mortgage" on the property: 30 & 31 Vict. c. 69, s. 2; and the next of kin are entitled to have the amount raised for their benefit.

As the whole fund is less than the value of the estate contracted to be purchased, the whole fund is personalty. The reason this point was not taken in *Hudson* v. *Cook* (1) is, that that was the case of intestacy, to which as the law then stood the principle of *Locke King's Act* did not apply: *Harding* v. *Harding* (2). This was not altered until 1877 by the Act 40 & 41 Vict. c. 34. The rescission of the contract in this case was by consent, and this would prevent *Hudson* v. *Cook* from applying.

Melville, for the infant remainderman:—

The Act of 1877, 40 & 41 Vict. c. 34, does not apply to the present case at all. The only question is, was there a valid contract between the testator and the vendor? For the respective interests of the devisees of the land and the legatees of the money or the next of kin, as the case may be, are completely fixed at the death of the testator: *Jarman* on Wills (3). If there was a valid contract, conversion was complete; and the compromise or cancellation of the contract after the death of the testator did not affect the rights of the persons claiming under the devise and the intestacy respectively: *Lysaght* v. *Edwards* (4).

Moreover, upon the face of the will, it is apparent that the testator considered he had converted his entire personalty (which was barely enough to pay the purchase-money) into realty, and had devised it, so that he had no other estate to dispose of. He also referred to *Seton* on Decrees (5).

Sturges, in reply:—

I need not deny that there was a conversion, but the Act of 1877 by charging the purchase-money on the estate effects (in the result) a reconversion.

(1) Law Rep. 13 Eq. 417.
(2) Ibid. 493.
(3) 4th Ed. p. 54.
(4) 2 Ch. D. 499.
(5) 4th Ed. p. 521.

KAY, J.
1883
In re COCKCROFT. BROADBENT *v.* GROVES.

July 13. KAY, J.:—

The series of statutes known as *Locke King's Acts* are three in number, viz., 17 & 18 Vict. c. 113 (1854), 30 & 31 Vict. c. 69 (1867), and 40 & 41 Vict. c. 34 (1877). The first of these after reciting that it is expedient that the law whereunder the real and personal assets of deceased persons are administered should be amended, makes a mortgaged estate left by a testator or intestate primarily liable to pay the mortgage debt, unless by his will, or deed, or other document, he has signified a contrary or other intention, saving however the right of the mortgagee to obtain full payment or satisfaction of his mortgage debt either out of the personal estate of the person so dying or otherwise.

The second statute provides that a general direction to pay debts out of the testator's personal estate, not mentioning or necessarily implying mortgage debts, is not to be deemed a declaration of a contrary intention, and also that in the construction of both Acts the word "mortgage" should be deemed to extend to any lien for unpaid purchase-money upon any lands or hereditaments purchased by a testator. This Act did not include a vendor's lien on land descending from one who died intestate.

The third statute enacted as follows: "The Acts mentioned in the schedule hereto" (which were the two statutes I have referred to), "shall, as to any testator or intestate dying after the 31st of December, 1877, be held to extend to a testator or intestate dying seised or possessed of, or entitled to any land or other hereditaments of whatever tenure which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, or any other equitable charge, including any lien for unpaid purchase-money; and the devisee, or legatee, or heir, shall not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate unless (in the case of a testator) he shall within the meaning of the said Acts have signified a contrary intention, and such contrary intention shall not be deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real and personal estate, or residuary real estate."

The object of these enactments was to subject any real estate of a testator or intestate to all the incumbrances upon it in

exoneration of the personal estate or other real estate, and to prevent the heir or devisee from being able to insist that the personal or other estate should be applied to discharge them. The former rule of administration, which entitled him to claim such exoneration, was fixed when personal estate was comparatively of small value or account, and the law favoured greatly the heir or devisee of the real estate. That law has been relaxed by degrees, first by subjecting real estate to the payment of the debts of the deceased, and more recently by the statutes which have made it primarily liable to all legal and equitable charges expressly in exoneration of the personal or other assets.

In the case before me a testator having in his lifetime contracted to purchase certain real estate, by his will in 1881 (after these statutes) devised it specifically in trust for his daughter, *Mary Ann Groves*, for life, with remainder to her children. His personal estate was undisposed of, so that it devolved upon his next of kin; but he did not in his will, either expressly or impliedly, intimate any intention that the unpaid purchase-money should be paid out of the personal estate. He died without having completed the purchase or paid all the purchase-money. The devisees now insist that they are entitled to so much of the personal estate as is equivalent to the unpaid purchase-money. It seems that after the testator's death a compromise was come to between the vendor of the property and the executor and trustee of the will, against whom the vendor had brought an action for specific performance of the testator's contract to purchase, and such compromise was confirmed by an order made in this action in the presence of the tenant for life of the real estate. The trustee would represent her children, none of whom have attained twenty-one, so that such order would be binding on them. In fact, I suppose it was their incapacity which made it necessary to obtain the sanction of the Court. By this compromise the contract was put an end to on the terms that the vendor was to retain the deposit of £50, and to have his costs.

There is therefore no real estate, and of course no lien to discharge, but the devisees now say that the purchase by the testator was a conversion of so much of his personal estate as was equivalent to the purchase-money, and that *Locke King's Acts* have not

KAY, J.
1883
In re COCKCROFT.
BROADBENT *v.* GROVES.

altered this, and that therefore they are entitled to so much of the personal estate. If this be a good claim in point of law, and not provided for by these statutes, I must accede to it. There would not be any equity against it. These Acts only provide that a vendor's lien shall be primarily paid out of the real estate. If a portion of the personal estate has been equitably converted, and thus must be treated as real estate, there is nothing in the Acts which affects the rights arising from that fact.

They are not in any respect a favourable specimen of legislation. The first of them expresses that a contrary intention to the primary liability of the estate charged may be signified by a will or deed or other document. But the last Act, which for the first time applies the rule as to vendors' lien to the administration of the estate of an intestate, seems to limit the exception of the expression of a contrary intention to the case of a testator, the draftsman apparently forgetting that it might be by deed or other document as well as by will. If this be the true interpretation, the expression by an intestate of a contrary intention by a deed or other document, would be effective in the case of a mortgage under the first Act, but not in the case of a vendor's lien.

Suppose that a testator or intestate had purchased real estate under such circumstances that the vendor had no lien, as for example, if the lien were excluded by express agreement in the contract of purchase, the case would not come within the Acts, and the devisee or heir would not be prevented by them from claiming to have the payment made out of the personal estate. The Acts do not interfere with the consequences of the contract of purchase unless there happens to be a lien on the estate.

But the answer to the argument in this case seems to me to be that here there was a vendor's lien, and the Act applied. And although it may be true in a sense that a purchase by a testator of real estate effects a conversion of a portion of his personal estate, this is rather a description of the consequence of such purchase, according to the old rule of administration, after his death, than an accurate legal definition of the act done by him in purchasing. Since these statutes, if he dies before paying the purchase-money, leaving it equitably charged by way of lien on the land, no such conversion is effected, because, in the words of the last of

these Acts, the devisee or heir is not entitled to have such sum discharged or satisfied out of any other estate of the testator or intestate. All that the devisees were entitled to was this real estate charged with the unpaid purchase-money. All that they have lost is such value as the land might have beyond that sum. If their present claim could be maintained it would also be maintainable if the purchase had not been rescinded, which would be directly contrary to the spirit and letter of these enactments.

But I think, also, that the order of compromise would be fatal to their claim if otherwise good. It was made in the presence of the tenant for life and the trustee, and was sanctioned by the Court, and is binding upon them all. Probably they lost little or nothing by this compromise.

In *Hudson* v. *Cook* (1), one of the cases cited, the purchaser had died intestate in 1869. The case was not therefore affected by these statutes, which did not apply the law as to vendor's lien to the case of an intestate dying before the 31st of December, 1877. The decision followed *Whittaker* v. *Whittaker* (2), in which it was held that where a devisee was entitled to have the devised land paid for out of the personal estate he did not lose that right by the rescission of the contract after the testator's death. As the case did not come within these statutes the decision is not applicable.

Solicitors: *Bell, Brodrick & Gray,* agents for *Hopps & Bedford, Leeds; Hamlin, Grammer, & Hamlin,* agents for *B. C. Pullan, Leeds; Gregory, Rowcliffes, & Co.*

(1) Law Rep. 13 Eq. 417.

(2) 4 Bro. C. C. 30.

W. W. K.

KAY, J.
1883
In re CRESSWELL.
PARKIN *v.* CRESSWELL.

Robert Cresswell died in 1863 without having married.

Charles and *William Cresswell* died in the lifetime of *Henry Cresswell* without having married, and *Thomas* also died in his lifetime, but left children.

Henry Cresswell died in July, 1874, without having married, and his brother, *George Cresswell* (No. 1), alone survived him, and was the person answering the description of "the next eldest son of *Joseph Cresswell* who shall survive *Henry*." This *George* (No. 1) died in April, 1879, having had issue three sons, viz., *Frederick John*, his eldest son, who was born on the 15th of December, 1859, and died on the 10th of January, 1860, and was the first tenant in tail in existence according to the limitations in the will; and two others, both of whom died infants, and without having married.

The sons of *Thomas* were three in number, viz., *Thomas* the younger, who died in infancy, and the Defendants *George Cresswell* (No. 2) and *Walter Cresswell*.

The above-mentioned *Robert Cresswell* was the heir of the testator; and the Defendant *G. P. Belcher* was the surviving executor of *Robert Cresswell*, and also (together with *Frederick Cresswell*) represented the real estate, which was vested in *Robert* at the time of his death.

This action was brought in the year 1879 by the surviving trustee of the testator's will against *George Cresswell* (No. 2) and *G. P. Belcher* to have the trusts of the testator's will carried into execution under the direction of the Court; and judgment was given accordingly on the 6th of March, 1880.

The action now came on upon further consideration, and the only question calling for a report was in whom the residuary personal estate and heirlooms subject to the trusts of the will were now respectively vested.

Ingle Joyce, for the Plaintiff.

Kekewich, Q.C., and *Northmore Lawrence*, for the Defendant *G. P. Belcher*, claimed the heirlooms and the residuary personal estate.

Hastings, Q.C., and *Elgood*, for the Defendant *George Cresswell*.

Method, for the legal personal representative of *Frederick John Cresswell*:—

Frederick John Cresswell was the first tenant in tail of the real estate settled by the will who came into existence, and the residuary personal estate and heirlooms vested in him on his birth. His contingent interest in the personalty was transmissible notwithstanding his death in *Henry's* lifetime, and before it could be ascertained whether *George*, his father, would survive *Henry* and take a life estate or not: *Pelham* v. *Gregory* (1).

It is settled that an estate may be given to *A.* in the event of something happening after *A.'s* death: *Stanley* v. *Wise* (2); *Pinbury* v. *Elkin* (3).

The contingency in this case is not as to the person to take, although, in the event, the contingency on which the gift to him took effect happened after his death. His estate tail merely depended upon the collateral event of his father surviving *Henry*, the prior tenant for life. Suppose *F. J. Cresswell* had died before his father leaving a son, that son would have taken by descent under the estate tail, notwithstanding the fact that *Henry* outlived *Frederick*. The gift over, which is in default of all issue coming in under the estate tail, shews that the estate would not fail merely because *Frederick* died in *Henry's* lifetime. Again, if *Frederick* had, before his death in the lifetime of *Henry* and *George*, attained twenty-one, he could have disentailed the real estate, so that he must have taken at his birth an estate tail in the realty.

With regard to the heirlooms, there is no declaration that they should not vest absolutely in any tenant in tail until twenty-one or death under that age, leaving issue inheritable under that entail; and, in the absence of this, they vested in *Frederick* upon his birth: *Countess of Harrington* v. *Earl of Harrington* (4); *Gosling* v. *Gosling* (5); *Christie* v. *Gosling* (6); *Fearne* on Contingent Remainders (7).

(1) 3 Bro. P. C. 204.
(2) 1 Cox, 432.
(3) 1 P. Wms. 563.
(4) Law Rep. 5 H. L. 87.
(5) 1 D. J. & S. 1.
(6) Law Rep. 1 H. L. 279.
(7) 10th Ed. p. 364.

KAY, J.
1883
In re CRESSWELL. PARKIN *v.* CRESSWELL.

Kekewich, Q.C., and *Northmore Lawrence*, for the Defendant *G. P. Belcher*:—

On the death of *George* the personal estate passed under the ultimate gift in the will to *Robert Cresswell*, and has devolved upon his executor. *Frederick's* interest therein was not transmissible, for it was necessary that both *George* and *Frederick* should be living at the death of *Henry*, as nothing could vest in *Frederick* until it was known that he would answer the description of being the eldest son of a person who survived *Henry*. The son of an unascertained person cannot be an ascertained person, and surely this kind of contingency is a personal contingency. Moreover, as to the heirlooms they do not vest, under such limitations as these, in a tenant in tail, unless his interest is indefeasible, and here the interest of *Frederick*, even if vested, was defeasible in case male issue of *Robert* or *Henry* came into existence: *Theobald* on Wills (1); *Hogg* v. *Jones* (2).

[They also cited *Leeming* v. *Sherratt* (3)].

P. B. Lambert, for the testator's next of kin:—

The language of Lord *Romilly* in *Hogg* v. *Jones* (4) shews that in his opinion, when (as here) the interest of a tenant in tail is defeasible during the whole period of his life, chattels in the nature of heirlooms cannot absolutely vest in him.

[He also cited *Martelli* v. *Holloway* (5)].

Rigby, Q.C., and *A. Bailey*, for *Frederick Cresswell*.

July 13. KAY, J.:—

The question in this case is whether the contingent interest of the eldest son of *George Cresswell* in the testator's personal estate was transmissible or whether the contingency was such that the eldest son of *George*, as well as *George* himself, should be living at the death of *Henry*.

If the gift had been to a person by name, as for example, to *A.*, in case his father should be living at the death of *Henry*, this

(1) 2nd Ed. p. 552.
(2) 32 Beav. 45.
(3) 2 Hare, 14.
(4) 32 Beav. 53.
(5) Law Rep. 5 H. L. 532.

interest, although contingent, would undoubtedly have been transmissible: *Anon.* (1); *King* v. *Withers* (2); *Pinbury* v. *Elkin* (3); *Chauncy* v. *Graydon* (4); *Stanley* v. *Wise* (5); *Taylor* v. *Graham* (6). So if the gift had been to the eldest son of *George* in case *George* should be living at the death of *Henry*. But the peculiarity of this limitation is that it is a gift to the eldest son, not necessarily of *George*, but of the next eldest son of *Joseph* who should survive *Henry*, so that no one could be sure until the death of *Henry* whose son would take under the limitation.

However, this does not make the surviving of *Henry* any part of the description of the person who was to take the absolute interest, and the eldest son of *George*, or the eldest son of a brother of *George*, had during the life of *Henry* a contingent interest which might be determined in his favour if his father happened to be the next eldest son of *Joseph* who survived *Henry*.

As far as I can discover, the only case in which a contingent future interest is not transmissible is where the being in existence when the contingency happens is an essential part of the description of the person who is to take. If in this case it had been a gift to the next eldest son of *Joseph*, who shall survive *Henry*, for his life, with remainder to his eldest son who shall also survive *Henry*, under such words, obviously, surviving *Henry* would be an essential part of the description of the legatee, and only the eldest son who did so survive would be entitled. But the argument seeks to add to the description of the legatee additional words of contingency making it necessary that he should be living at the death of *Henry*, which are not to be found in this will.

Another mode of trying the case is to consider what must be the effect of this limitation upon the real estate comprised in it. It is well settled that the transmissibility of contingent interests is a doctrine applying equally to real and personal estate, and in the case of real estate to contingent remainders as well as executory devisees. This appears from *Fearne* on Contingent

(1) 2 Vent. 347.
(2) Cas. t. Tal. 117.
(3) 1 P. Wms. 563.
(4) 2 Atk. 616.
(5) 1 Cox, 432.
(6) 3 App. Cas. 1287.

KAY, J.
1883
In re CRESSWELL.
PARKIN *v.* CRESSWELL.

Remainders (1). In *Butler's* note at page 364, the doctrine is stated thus: "A contingent remainder of inheritance is transmissible to the heirs of the person to whom it is limited, if such person chance to die before the contingency happens, except the existence of the devisee of the contingent interest at some particular time may by implication enter and make a part of the contingency itself, upon which such interest is intended to take effect."

Now, suppose that *George* had survived *Henry*, having at *Henry's* death a grandson living, son of his deceased eldest son, and having also a second son living, would the grandson or the second son of *George* take the estate tail in remainder subject to the life interest of *George?* It seems to me impossible to doubt that the grandson would take an estate tail with remainder in tail to the second son of *George*. But the grandson would only take as heir in tail to his deceased father, the eldest son of *George*, whose contingent estate was transmitted to him.

For these reasons, I am of opinion that the eldest son of *George* had a contingent interest in the testator's personal estate transmissible to his legal personal representative, and that it devolved upon the death of *George* to the legal personal representative of his deceased eldest son.

A similar question arises upon the limitation of the heirlooms in this will. They are given to the testator's wife for life, and after her death to be considered as heirlooms, and to pass with the testator's real estate in *Edale*, in the county of *Derby*, in the same manner as if they were an estate of inheritance at Common Law, and the testator directed that they should so continue annexed to his said real estate as long as the law would permit, to be inherited by the several persons who should succeed to his said real estate in the manner thereinbefore mentioned, and then follow the limitations of the real estate to which I have referred.

This would entitle the first tenant in tail by purchase to the heirlooms absolutely: *Gosling* v. *Gosling* (2); *Christie* v. *Gosling* (3). And the question as to them becomes the same as that concerning the other settled personal estate.

(1) 10th Ed. pp. 364–551.
(2) 1 D. J. & S. 1.
(3) Law Rep. 1 H. L. 279.

A case of *Hogg* v. *Jones* (1) was much relied on, in which the limitation was "to the person who for the time being shall be in the actual possession and enjoyment of my freehold estates under the limitations of my will." A tenant in tail came into existence, whose estate was liable to be defeated by the birth of a son of a preceding tenant for life. It never was so defeated; but it did not come into possession during his lifetime, for he died before that life estate determined, leaving a son who would have been heir in tail in possession if his father had not barred the estate tail. Lord *Romilly* held this son entitled to the heirlooms, and he used language which certainly intimated an opinion that his father could not be, because his estate was defeasible, though it was never in fact defeated. It is enough to say that the decision, which was upon the effect of the words "actual possession and enjoyment," does not affect this case.

The result at which I have arrived is that in the events which have happened the eldest son of *George* was entitled to an estate tail by purchase, which would have been transmitted to his issue in tail, and would have vested at the death of *Henry* in any such issue then living, subject to the life interest of *George*.

In the same manner, at the death of *Henry* the personal estate and the heirlooms vested in the legal personal representative of such eldest son, subject, of course, to the life estate of his father *George*.

Solicitors: *Gregory, Rowcliffes, & Co.; Tyas & Huntington; Iliffe & Co.*

(1) 32 Beav. 45.

W. W. K.

NORTH, J. 1883 July 9.

RASBOTHAM *v.* SHROPSHIRE UNION RAILWAYS AND CANAL COMPANY.

[1882 R. 2434.]

Interrogatories—Sufficiency of Answer—Knowledge of Servant or Agent.

In an action by owners of water mills to restrain a canal company, who had statutory power to take water from the river on which the Plaintiffs' mills were situate, from wrongfully diminishing the quantity of water in the river to the injury of the Plaintiffs, the Defendants interrogated the Plaintiffs and asked them to give a list of the days between specified dates on which they alleged that the working of their mills was interfered with by the negligence of the Defendants. The Plaintiffs answered that they were unable to specify the particular days:—

Held, that this answer was sufficient, and that the Plaintiffs were not bound to state whether they had made inquiries of their agents, servants, and workmen.

Bolckow v. *Fisher* (1) distinguished.

Adjourned summons.

This was a summons by the Defendants to consider the sufficiency of the answer of the Plaintiffs to some interrogatories delivered by the Defendants for the examination of the Plaintiffs.

The Plaintiffs were the owners, and one of them, *William Johnson*, was the tenant, of some water mills at *Chester*, situate on the River *Dee*. The Defendants were a public company, incorporated under the Act 7 & 8 Geo. 4, c. cii. and other Acts, for the construction of certain canals. By their Acts they were empowered to draw off water from the River *Dee*, at *Llandysilio*, in the county of *Denbigh*, for the purpose of feeding their canals, but subject to the condition that by means of other works at *Bala Pool*, in the county of *Merioneth*, they should convey into the river out of *Bala Pool* an equal or greater quantity of water than should have been taken by them out of the river at *Llandysilio*.

The Plaintiffs complained that the Defendants had not fulfilled their statutory obligations, and had wrongfully diminished the quantity of water flowing down the river to the injury of the Plaintiffs, and the Plaintiffs claimed damages and an injunction.

(1) 10 Q. B. D. 161.

One of the interrogatories delivered by the Defendants for the examination of the Plaintiffs was as follows:—

"Give a list of the days between April, 1882, and November, 1882, on which you allege that the working of your mills was interfered with by reason of the Defendants having negligently or irregularly returned water from *Bala Pool* into the River *Dee*. Describe the nature and immediate cause of the interference with the proper working of the mills on each day, and state what negligent act or acts they were which the Defendants committed in conveying the water from *Bala Pool* which caused such interference on each of the days mentioned in the said list."

The answer to the interrogatories was made by the Plaintiff, *William Johnson*, and in answer to the above interrogatory he said (*inter alia*), "We say that the Defendants have negligently and irregularly conveyed water from *Bala Pool* into the said stream, and I say that the working of our mills was interfered with by reason thereof at various times between April and November, 1882, but I am unable to specify the particular days on which such interference occurred."

The Defendants objected that this answer (*inter alia*) was insufficient.

Ernest R. Moon, for the Defendants:—

The Plaintiffs are bound to inquire of their servants and agents on what days the interference in question occurred, and they may thus obtain information which may enable them to answer the question. Their answer does not shew that they have done this: *Bolckow* v. *Fisher* (1).

Levett, for the Plaintiffs:—

The answer is sufficient. *Bolckow* v. *Fisher* does not apply. In that case the action was against shipowners for the loss of a cargo, and interrogatories were delivered by the Plaintiffs as to acts done by the persons on board the ship, and the Defendants expressly stated in their answer that they had not made any inquiries of the officers or of the crew. We are not asked as to the knowledge of our agents. Our answer is clearly an honest

(1) 10 Q. B. D. 161.

NORTH, J.
1883
RASBOTHAM v. SHROPSHIRE UNION RAILWAYS AND CANAL COMPANY.

one. A man who is asked whether he knows a certain thing is not bound to state whether he has asked all his agents, servants, and clerks about it; it will be assumed that he has made all proper inquiries.

Moon, in reply:—

The person interrogated is bound to state whether he has done that which he ought to have done. The principle of *Bolckow* v. *Fisher* (1) applies.

NORTH, J.:—

I cannot allow this objection. Looking at the whole of the answer to this interrogatory, and reading what is said to be the cause of the interference, I think the answer given by the Plaintiff, that he is unable to specify the particular days on which the interference occurred, is really a complete answer to the question. It is said that the answer is not sufficient, because he does not go on to say that he has inquired of the persons in his employment whether they can give him any information on the subject. But he is not interrogated as to that; he is simply asked what he knows. The decision in *Bolckow* v. *Fisher* is distinctly put on this, that when a man is interrogated as to what he did by his servants or agents, he is not entitled to say that he will not ask them about it. There are, I think, some cases in which the person interrogated would be bound to say whether he had inquired of his agents, although he was not asked about it in so many words, for instance, in a case where that which was done was obviously done by the servants and agents in the master's absence. This seems to me to be the effect of the judgment of Lord Justice *Lindley* in *Bolckow* v. *Fisher*, and Lord Justice *Baggallay* put it in exactly the same way. He said (2) that "the practice in the Court of Chancery prior to the *Judicature Acts* was this, that where an act was done by an agent which the principal himself could not have done, the right to require information as to the acts of such agent was beyond all question. Of course, it was governed by that which is embodied in the 5th rule, and if the interrogatory was for the purpose of increasing

(1) 10 Q. B. D. 161. (2) 10 Q. B. D. 167.

costs or was irrelevant, the interrogatory would be disallowed. When, however, the interrogatories were as to matters, the knowledge of which was essential to the ascertaining of the rights of the parties to what was in issue in the cause, I have certainly never known an instance in which the Court of Chancery refused to allow them to be put because they were as to the acts of an agent of the party interrogated." He then refers to *Attorney-General* v. *Rees* (1), and he says that "the Court proceeded upon the assumption that the work must have been done by his workmen, and held that he was bound, not only to answer with regard to his own knowledge, but to obtain information from the persons by whom, as his agents, the act was done." And Lord Justice *Brett* said (2): "In my opinion, a party is not excused from answering with regard to certain acts by saying that he himself was not present when those acts might have been done, but his servants or agents were, if those acts were such as in the ordinary course of business would be done by or be known to his servants or agents." Therefore, if a man is interrogated about acts which are done in the presence of persons employed by him, their knowledge is his knowledge, and he is bound to answer in respect of that. But in the present case there is nothing to shew that the acts referred to were done in the presence of the Plaintiffs' servants or agents, or that the answer is not perfectly genuine and fair, when the person interrogated says that he cannot give any further information. I do not think any further answer can be required than that which has been given.

Solicitors for Plaintiffs: *Bolton, Robbins, Busk, & Co.*

Solicitors for Defendants: *Philpot & Son,* agents for *Potts & Roberts, Chester.*

(1) 12 Beav. 50. (2) 10 Q. B. D. 169.

W. L. C.

NORTH, J.

1883

July 11.

In re MORGAN.

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 58, *sub-s.* 2—*Infant having Powers of Tenant for Life—Contingency of attaining Twenty-one—Executory Limitation.*

Certain estates were devised to the use of the testator's wife and *G. T.*, upon trust to pay the net rents and income of the estates to the wife for the maintenance, education, and benefit of the testator's son until he should attain twenty-one, and without being liable to account to the trustees or to the son for the same; and upon the son's attaining twenty-one, then upon trust for him absolutely; but if he should die under twenty-one without leaving issue, then upon trust to permit the wife to receive such rents and income for her life, and after her death upon the trusts therein mentioned:—

Held, under the *Settled Land Act*, 1882, s. 58, sub-s. 2, that the infant son had the powers of a tenant for life, being tenant in fee simple with an executory limitation over in case of dying under twenty-one without issue. The trustees of the will appointed trustees for the purposes of the Act.

THIS was an application on the part of *J. W. Morgan*, an infant, under a settlement made by the will of *John Morgan*, dated the 6th of June, 1873, by *Mary Morgan*, widow, his testamentary guardian, that it might be declared that *J. W. Morgan* was a tenant for life, or person who had the powers of a tenant for life under the settlement within the meaning of the *Settled Land Act*, 1882. 2. That the said *Mary Morgan* and *G. D. Thomas* might be appointed trustees under the before-mentioned settlement for the purpose of the said Act. 3. That the costs might be taxed as between solicitor and client and paid out of the property, subject to the said settlement.

By the will of *John Morgan* certain property therein specified comprising freehold, leasehold, and personal property was given unto and to the use of the testator's wife *Mary Morgan* and the said *G. D. Thomas*, their heirs, executors, administrators, and assigns, according to the nature and quality thereof respectively, upon trust to pay the net rents, interests, dividends, and income of the said hereditaments and personal property unto his said wife for the maintenance, education, and benefit of his son *J. W. Morgan* until he should attain the age of twenty-one years, and without being liable to account to his trustees or his said son for the

same; and upon his attaining that age, then upon trust for him absolutely, but if he should die under that age without leaving issue, then upon trust to permit his wife to receive such rents, interest, dividends, and income for her own benefit during her life if she should continue a widow, and after her decease or second marriage, then upon trust for his grandchildren who should attain twenty-one, or should die under that age leaving issue, and if more than one, in equal shares. Then followed other devises and bequests not affecting the question now raised. And the will contained a proviso that it should be lawful for the trustees or trustee for the time being of any of the lands or hereditaments devised to them by his will to sell and convey all or any part or parts of such lands or hereditaments in consideration of annual ground rents or fee farm rents to be reserved out of or charged and secured on the lands or hereditaments so to be reserved or charged and secured and made payable in such manner as to the said trustees or trustee for the time being should seem expedient, and such ground rents or fee farm rents should be held by trustees or trustee for the time being upon trust for the benefit of such person or persons as would from time to time be entitled to the lands or hereditaments so conveyed or the rents and profits thereof in case such sale had not been made, and a further power was given to the trustees to demise on lease the same property at rack rent for any term of years in possession, but so that no fine or premium be taken on such demised property. No other power was given by the will to sell any portion of the property.

The trustees were desirous of selling for a lump sum a small piece of land included in the devise to the infant. The purchaser objected that the trustees had no power of sale; the trustees therefore proposed to have themselves appointed trustees under the *Settled Land Act*, and they could then sell as trustees exercising the powers of the infant tenant for life. The purchaser objected that the infant was not a tenant for life.

Cozens-Hardy, Q.C., and *R. F. Norton*, for the infant:—

We submit that the infant is in his own right seised of or entitled to possession within sect. 59, and is within the same

NORTH, J. 1883 *In re* MORGAN.

section tenant for life. But if the infant is not within the 59th section, because of his estate being contingent on his attaining twenty-one, then he has the powers of a tenant for life under sect. 58, sub-sects. 2, 6, or 9.

Thirdly, if he is not entitled under either of the above sections, then the infant and mother constitute together the tenants for life: sect. 2, sub-sects. 5, 6, 7. Or he may be tenant in fee simple with an executory limitation over on failure of issue, and then he would come under sect. 58, sub-sect. 2.

Bousfield, for the trustees:—

All parties concur in carrying out this arrangement if the Court finds that it can make the order.

NORTH, J.:—

In my opinion this case does come under sect. 58, sub-sect. 2. That section first of all contains a provision that "each person shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act as if each of them were a tenant for life." I think "possession" there clearly means possession properly so called as distinguished from remainder or reversion, and does not draw any distinction as regards a person in possession personally or by his guardian if an infant. I think it means possession as distinguished from reversion. Then the 2nd sub-section provides for the case of "a tenant in fee simple" in possession—that comes from the earlier words "with an executory limitation, gift, or disposition over, on failure of his issue." Then I should add that the interpretation clause says that "possession includes receipt of income," and therefore if he is in receipt of income he is in possession. Under the will the income is given to the wife of the settlor "for the maintenance, education, and benefit of my said son *John Wesley Morgan* until he shall attain the age of twenty-one years, and without being liable to account." The whole of it is given for those purposes; independently of any question whether, when those purposes are answered, the mother might retain any surplus for her benefit. There is certainly a trust imposed on the whole for the son's benefit so far as he requires it, and that cannot be

limited by any such consideration as whether the widow might retain anything without accounting for it, if the purposes for which the money was given to her were fully answered. That being so, the words apply, that the person having the power of a tenant for life may be "a tenant in fee simple with an executory limitation, gift, or disposition over on failure of his issue." Here the income is limited in the way I have mentioned, to the wife for the child's maintenance, education, and benefit until he attains twenty-one, without being liable to account; and "upon his attaining that age then upon trust for him absolutely, but if he shall die under the age of twenty-one years without leaving issue" then upon trust "to permit my said wife to receive such rents, interest, dividends, and income." That is clearly an executory limitation or disposition over on failure of his issue. It is not on failure of issue in every event, but in case of failure of issue if he dies under twenty-one years. Still it is not the less failure of his issue; and therefore it comes within the 2nd subsection of sect. 58, which I have read. I cannot say it means failure of issue at one age and not at another age; because the words "or in any other event" mean something other than failure of issue at any age. But failure of issue is quite enough. Under these circumstances that section seems to me to govern the case, and I shall act upon that view, that the infant has the power of a tenant for life; although he is not strictly the tenant for life.

Cozens-Hardy, Q.C.:—Then your Lordship will declare that *J. W. Morgan* is a person who has the powers of a tenant for life under the settlement within the meaning of the *Settled Land Act*, 1882; and now I have to ask that the mother and the other trustee of the will be appointed trustees under the settlement for the purposes of the Act; and that the costs may come out of the capital money subject to the trusts of the will.

NORTH, J.:—Yes, I think that is the usual order.

Declare that *J. W. Morgan* is a person who has the powers of a tenant for life under the settlement within the meaning of the

NORTH, J. 1883 *In re* MORGAN.

Settled Land Act, 1882; that the said *Mary Morgan* and *G. D. Thomas* be appointed trustees under the before mentioned settlement for the purposes of the said Act; and that the costs of all parties be taxed as between solicitor and client, and paid out of the property subject to the trusts of the settlement; and that for that purpose all necessary directions may be given.

Solicitors: *Clarke, Woodcock, & Ryland.*

T. W. G.

Ex parte BIRKBECK FREEHOLD LAND SOCIETY.

PEARSON, J.

1883
May, 4, 5, 28.

Vendor and Purchaser—Title—Unstamped Deed—Compulsory Purchase—Payment into Court—Costs of Petition—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 75, 80, 82 [*Revised Ed. Statutes vol. ix., pp.* 644, 646, 647.]

A freehold land society in 1871 purchased some land in *Epping Forest*, which was conveyed to them in fee. They conveyed it in allotments to various members of the society who respectively paid for their allotments. Afterwards the *Epping Forest Act*, 1878, was passed, and it provided that the land (together with other lands) should be thrown open to the public, certain compensation, the amount of which was to be ascertained by an arbitrator, being paid by the Conservators appointed by the Act to the owner of the soil of any land thrown open. With the Act were incorporated the provisions of the *Land Clauses Act*, 1845, with respect to the purchase-money or compensation coming to parties having limited interests, or prevented from treating, or not making title, and with respect to the conveyances of lands. After the passing of the Act the land society repurchased the allotments from the allottees, repaying them their purchase-moneys. The allottees reconveyed the plots to the trustees of the society, the reconveyances being indorsed on the original conveyances, but the reconveyances were not stamped within the proper time after execution. The arbitrator determined the amount of compensation to be paid by the Conservators to the society, and the society furnished an abstract of title to the Conservators. The Conservators made no objection to the title, except that the reconveyances ought to be stamped, and they required the society to have them stamped at their own expense. The society declined to do this, but offered that the allottees should join with the trustees of the society in a conveyance to the Conservators. The Conservators would not accept this offer, but paid the compensation money into Court, and, under sect. 75 of the *Lands Clauses Act*, executed a deed-poll vesting the land in themselves in fee. The society petitioned for payment of the money to them:—

Held, that it was not necessary that the reconveyances should be stamped; that the Conservators ought to have been satisfied with the conveyance offered them by the society; and that the Conservators must pay the costs of the petition.

Whiting to Loomes (1) distinguished.

PETITION.

In the year 1871 the *Birkbeck Freehold Land Society* purchased certain plots of land at *Woodford*, situate within the limits of

(1) 14 Ch. D. 822; 17 Ch. D. 10.

PEARSON, J. 1883 *Ex parte* BIRKBECK FREEHOLD LAND SOCIETY.

Epping Forest, and the plots so purchased were conveyed as for an estate in fee simple to the trustees of the society. Some of these plots were afterwards under the rules of the society allotted to some of the members, and were conveyed to them accordingly by the trustees. After this had been done the *Epping Forest Act*, 1878 (41 & 42 Vict. c. ccxiii.), was passed. By sect. 11 of that Act it was provided that certain lands (therein designated as the "pink lands") should "be deemed to have been open waste lands of *Epping Forest* on the 14th of August, 1851," and that, subject to the provisions of the Act, the "pink lands" should be thrown open, with certain exceptions therein mentioned. The same section also referred to the arbitrator thereby appointed "the question what sum shall be paid by the Conservators to the owner of the soil of any portion of the pink lands thrown open as purchase-money for the soil thereof, with the minerals thereunder and timber thereon." By sect. 3 the corporation of the city of *London* were appointed Conservators of the Forest. The plots of land purchased by the *Birkbeck Society* formed part of the pink lands which were to be thrown open.

By sect. 24, "The provisions of the *Lands Clauses Consolidation Act*, 1845, with respect to the purchase-money or compensation coming to parties having limited interests, or prevented from treating, or not making title, and with respect to the conveyances of lands, and any provisions of any Act amending those provisions, are hereby incorporated with this Act; and for that purpose this Act shall be the special Act, and the acquisition by the Conservators of lands, estates, rights, and interests in *Epping Forest* shall be the undertaking, and the Conservators shall be the promoters of the undertaking."

After the passing of the Act the *Birkbeck Society* determined that none of their members should be losers through their having purchased from the society plots of land which were thus to be thrown open, and they accordingly resolved to repurchase from those members respectively to whom plots forming part of the pink lands had been conveyed by the society, the plots which had respectively been conveyed to them, at the prices which those members respectively had paid to the society. This was accordingly done, and the members whose plots were thus repurchased

respectively executed reconveyances to the society, the reconveyances being indorsed on the conveyances. The deeds of reconveyance were not stamped within the proper time after execution.

On the 3rd of October, 1881, the arbitrator determined that the *Birkbeck Society* should receive from the Conservators the sum of £397 for their interest in the soil and minerals of the plots which they had purchased in 1871, and for the timber thereon, and that the plots should be thrown open immediately on the payment of the £397 by the Conservators to the society, and that on such payment the society should, at the expense of the Conservators, execute a conveyance of the plots to them. The society furnished an abstract of title to the Conservators, and the Conservators took the objection that the reconveyances by the allottees to the trustees of the society ought to have been stamped, and required the society to have the reconveyances stamped at their own expense. No other objection to the title was taken. The matter was referred to the arbitrator, and he expressed an opinion that the reconveyances need not be stamped, but that it would be sufficient if the allottees who had reconveyed to the society joined in the conveyance by the society to the Conservators. The Conservators still required that the reconveyances should be stamped and the *Birkbeck Society* still refused to comply with the requisition. On the 10th of January, 1883, the Conservators paid the £397 into Court, and they then, under the provisions of sect. 75 of the *Lands Clauses Consolidation Act*, executed a deed-poll vesting the plots of land in themselves in fee. The trustees of the *Birkbeck Society* presented a petition asking that the £397 might be paid out to them on behalf of the society, and that the Conservators might be ordered to pay to the society the costs of the conveyance of the land, or which should have been incurred in consequence thereof, and also the costs of the petition.

Owen, for the Petitioners:—

The money has been unnecessarily paid into Court. There was no reason for stamping the reconveyances. The Conservators would obtain a perfectly good title by a conveyance from the society, the allottees joining in it, as we offered.

PEARSON, J. 1883 *Ex parte* BIRKBECK FREEHOLD LAND SOCIETY.

W. Baker, for the Conservators:—

We had a right to insist on the stamping of the reconveyances. The society could not make a good title without these deeds, and the deeds could not be adduced in evidence without being stamped. The reconveyances would form part of our title: *Whiting to Loomes* (1).

We could not put the reconveyances in the fire. Suppose a vesting order of land had not been stamped, could the penalty be evaded by getting the Court to make a new vesting order? The principle is the same as if the reconveyances had been conveyances to a third party. Suppose a title was set up by some one claiming through the allottees; we could not, if the reconveyances were unstamped, produce the evidence necessary to defeat the claim. No conveyance from persons who have nothing in them can make good a title which is otherwise bad. And here the blot is shewn by the indorsement of the reconveyances on the original conveyances. We were justified in paying the money into Court. The society have wilfully neglected to make out a good title to the land, and we ought not to pay the costs of the petition: *Lands Clauses Consolidation Act*, 1845, sect. 80.

Owen, in reply:—

The Conservators obtain a statutory title under the Act, and no conveyance was necessary. But if a railway company, admitting that a good title had been shewn to land which they were taking, insisted on having a deed stamped, they would have to pay for it: *Haynes* v. *Barton* (2); *In re Liverpool Improvement Act* (3).

[PEARSON, J.:—You would have to release your rights in the mines and the timber; that would require a conveyance.]

Still the Conservators are bound to pay all the costs.

PEARSON, J.:—

This matter comes before me, after all the arguments which I have heard, simply on the question of costs, the question, that is,

(1) 14 Ch. D. 822; 17 Ch. D. 10.
(2) 1 Dr. & Sm. 483.
(3) Law Rep. 5 Eq. 282.

699.

1883

Ex parte BIRKBECK FREEHOLD LAND SOCIETY.

whether the money was properly paid into Court on the ground that the trustees of the *Birkbeck Society* did not execute a proper conveyance of the property to the Conservators. It stands in this way, and it raises a rather curious point.

It appears that the *Birkbeck Society* had allotted some portions of these lands, if not the whole of them, to certain members of their body, on the assumption that they could deal with them as freehold lands, and could vest them as such in their allottees. After the passing of the *Epping Forest Act* it was plain that the society had assumed to grant to their allottees that which they had not the right to grant, and the society, in order to put matters right, said to the allottees, "We now find we have given you a bad title, and we will repay you all the sums you have paid us for the allotments, you reconveying them to us, in order that we may then dispose of them as we are bound to do under the *Epping Forest Act*." That arrangement having been proposed to the allottees they accepted it, and reconveyed the property to the trustees of the society, the deeds of reconveyance being indorsed upon the original conveyances, but they were not stamped.

Under these circumstances an abstract of the society's title is handed to the Conservators, and they approve of the title. They say, "You have shewn us a good title, but the deeds of reconveyance are part of the title, and ought to be stamped. We may have to produce them hereafter in order to defend our title, and we call upon you to have these deeds stamped." The *Birkbeck Society* say, "This will put us to a very large expense, an excessive expense having regard to the value of the property and the compensation money we are to receive for handing it over to you, and we decline to stamp the deeds." Thereupon all the parties go before the arbitrator and suggest this difficulty to him, and he, not having, as I conceive (which is putting it most favourably for the Conservators), any direct authority to determine the proper form of conveyance, or the necessary parties to it, nor this abstruse point as to the stamping of the deeds, suggests that the difficulty may be got over if the allottees who have reconveyed will join in the conveyance by the trustees of the society to the Conservators, because then at all events there will be evidence

PEARSON, J.

1883

Ex parte BIRKBECK FREEHOLD LAND SOCIETY.

upon the title that the allottees have conveyed such interest (if any) as they had at the time of the conveyance to the Conservators. The trustees of the society would convey the whole of their interest to the Conservators, and the allottees would bind all their rights, whether legal or equitable. The arbitrator said: "I think with such a deed as that you would get a perfectly good title, and that deed would be stamped as an ordinary conveyance dated in the present year, there being no penalty to pay." The penalty, of course, was really what the society wished to avoid paying. I come to the same conclusion as the arbitrator did. I think he was right. I think this is a totally different case from *Whiting to Loomes* (1). In that case the deed which was left unstamped was a mortgage deed, and, as I gather from the judgment of *Jessel*, M.R., it was a mortgage for a term. The deed was a valid mortgage deed, which had been acted upon, and you could not make the mortgagee a party to the conveyance without being obliged to shew subsequently why he was there and what his interest was. Not only so, but the Master of the Rolls expressly said that the purchaser had a right to be able to use the term afterwards, if necessary, as a protection to him. As I understand the decision of the Master of the Rolls it went mainly upon this, not only that the mortgage was a valid deed, but that it might possibly, and not improbably, be of use to the purchaser, and that he was entitled to have it as a shelter in case any mischief should arise afterwards. I do not find anything different in the judgments of the Court of Appeal; they seem to have indorsed what the Master of the Rolls said, to have adopted his line of argument, and to have confirmed his decision on the grounds upon which he based it. In the present case I find nothing of the same kind. Here the reconveyance was executed for no other purpose than to vest the legal estate in the trustees of the *Birkbeck Society*, in order that it might be conveyed by them to the Conservators. The whole object and intent of the reconveyance was to enable the trustees to vest the legal estate in the Conservators under the *Epping Forest Act*. If the reconveyance alone did not enable the trustees to do that, then a subsequent deed, in which the allottees should join with the trustees

(1) 14 Ch. D. 822; 17 Ch. D. 10.

in conveying to the Conservators, would be manifestly and plainly sufficient, and if at any time afterwards, simply with regard to the title and not as evidence in a Court of justice, the reconveyance should crop up, so far from throwing any doubt upon the title it would explain the matter, and shew beyond all doubt that the Conservators had got everything which they could desire; that the entire legal estate, free from any claim, legal or equitable, was vested in them under a conveyance to which the allottees were parties.

On this ground I think that the Conservators were not entitled to require that the reconveyances should be stamped at the expense of the *Birkbeck Society*, but that they ought to have been content with the conveyance which was offered to them. Independently of that, I entertain very great doubt whether, this being a compulsory purchase, the Conservators could require the society to stamp these deeds, for the matter stands thus. The trustees had got the reconveyances from the allottees, and the trustees were entitled, if they pleased, to rest upon those reconveyances without having them stamped, subject, of course, to this, that if at any time they wanted to produce those deeds as evidence of their title, they would be unable to do so without then paying the penalty. But it is plain that in a great many cases it may be better for a person to rest content with an unstamped deed than to pay the penalty for putting the stamp on, because if he had got possession of the property at the end of twelve years it would be absolutely immaterial to him whether the deed was stamped or not.

Under all the circumstances I think the objection was absolutely untenable; and I may add that if there was any difficulty with regard to the stamping, the Conservators had always the power to do that (which in fact they have done)—to vest the legal estate in themselves by a deed-poll. I do not see any reason why, under the circumstances, they should not have been content to act upon the advice of the arbitrator, to accept the conveyance offered them and to pay the money to the trustees.

Under these circumstances I think the Conservators ought to pay the costs of this petition.

PEARSON, J. 1883 *Ex parte* BIRKBANK FREEHOLD LAND SOCIETY.

May 28. *W. Baker*, for the Conservators, asked for leave to appeal on the question of costs.

PEARSON, J., refused to give leave.

Solicitors for *Birkbeck Society*: *Poncione & Leggatt.*
Solicitor for Conservators: *The City Solicitor.*

W. L. C.

PEARSON, J. 1883 *May* 10.

BURSTALL *v.* FEARON.

[1874 B. 166.]

Practice—Revivor—Death of sole Plaintiff—Order of Course—Person attending Proceedings—Rules of Court, 1875, *Order* L.

A person served with notice of an administration judgment, and having obtained liberty to attend the proceedings under it, is in the same position as a party to the action, and is entitled to obtain an order of course to revive the action on the death of the sole plaintiff.

Delaney v. *Delaney* (1) distinguished.

Dobson v. *Faithwaite* (2) followed.

THIS suit was commenced in the Court of Chancery on the 28th of May, 1874, for the administration of the real and personal estate of *Edward Burstall*, who died on the 24th of November, 1871, and the execution of the trusts of his will. By his will he devised and bequeathed his real and personal estate to trustees, upon trust for sale and conversion, and to stand possessed of the proceeds upon trust, after payment of his debts and funeral and testamentary expenses and legacies, to invest the residue on the securities therein mentioned, and out of the income to pay an annuity of £1200 to his wife during her life, and subject thereto to raise out of the income an annual sum not exceeding £500 for the maintenance and education of his son *Edward John Burstall* until he should attain twenty-five, and to accumulate the surplus income, and when he should have attained twenty-five, to hold the trust estate and the accumulations upon trust to pay the

(1) 27 Sol. J. 418.

(2) 30 Beav. 228.

income thereof to his said son, or apply the same for his benefit, as therein mentioned, during his life, with certain provisions for the benefit of his wife and children after his death or the sooner determination of his interest. His life interest was made determinable on his bankruptcy or on his attempting to alienate it. On the failure of those trusts the testator gave the trust fund upon trust as to £10,000, part thereof, for his nephew *John Henry Burstall*; as to another sum of £10,000, in trust for the benefit of the widow of the testator's late brother, *Francis Burstall*, and her children; as to a third sum of £10,000, on trust for the benefit of the testator's sister *Elizabeth Murray*; as to a fourth sum of £10,000, in trust for the three daughters of the testator's sister *Mary Ann Swan*; and as to a fifth sum of £10,000, in trust for the testator's cousin *Stephen Burstall*; and as to the residue of his estate, the testator declared that his trustees should stand possessed of it in trust for his said nephew *John Henry Burstall* absolutely.

The Plaintiff was the testator's widow, who was also an executrix of his will; the Defendants were two other executors who had proved the will. The Plaintiff and the Defendants were also trustees of the will. An administration decree was made on the 6th of June, 1874; the Chief Clerk made his certificate on the 28th of July, 1881; and the cause was heard on further consideration on the 5th of August, 1881. On the 25th of February, 1875, an order had been made giving liberty to *J. H. Burstall*, who had been served with notice of the decree, to attend the proceedings in the action. On the 23rd of April, 1883, the Plaintiff died. *J. H. Burstall* then applied for an order of course to revive the action, substituting him as plaintiff for the deceased plaintiff. The secretary of the Master of the Rolls refused to make the order on the ground of a recent decision of Mr. Justice *Chitty* in *Delaney* v. *Delaney* (1). *J. H. Burstall* then gave notice of motion, asking that he might be appointed to carry on the action and prosecute the proceedings therein as plaintiff in the place of the deceased plaintiff, and that all further proceedings in the action might thereupon be carried on between him as Plaintiff and the Defendants.

(1) 27 Sol. J. 418.

PEARSON, J.

1883

BURSTALL v. FEARON.

Everitt, Q.C., and *Owen*, for the motion :—

In *Delaney* v. *Delaney* (1) the person to whom an order of revivor was refused had not obtained liberty to attend the proceedings in the action, and therefore was not in the position of a party to the action. That this is the true distinction appears from *Dobson* v. *Faithwaite* (2).

A. Beddall, for *E. J. Burstall* :—

I am really the residuary legatee; the Applicant takes an interest only if I die without issue. I am the proper person to carry on the suit.

Waggett, for other persons attending the proceedings.

Everitt, in reply :—

Any one who has a substantial interest in the subject-matter is entitled to an order to revive. *E. J. Burstall* is not married. If I had obtained an order of course to revive, which I should have done but for the mistake of the officer of the Court, *E. J. Burstall* could not have displaced me. I was the first applicant. The only question now is as to making the suit effective again; it is a distinct question who is to have the conduct of the proceedings.

PEARSON, J. :—

I think the decision in *Delaney* v. *Delaney* is quite consistent with *Dobson* v. *Faithwaite*. The note of the decision of the Lords Justices, given in 30 Beav. 228, shews that a person who has obtained liberty to attend the proceedings under an administration decree stands in the position of a party to the suit, and may obtain an order of course for revivor. I am of opinion that Mr. *Everitt's* client ought to have the order. There is not the slightest objection to his having it, and he applied for it first. He has a greater interest than *E. J. Burstall* in making the residue exceed the amount of the legacies of £10,000 given out of it. The costs of all parties of the motion will be costs in the

(1) 27 Sol. J. 418.

(2) 30 Beav. 228.

action. As a general rule such applications ought to be made *ex parte*, but under the circumstances of this case it was proper to give a notice of motion.

PEARSON, J.
1883
BURSTALL v. FEARON.

Solicitors: *Bompas, Bischoff, & Dodgson; Stevens, Bawtree, & Stevens.*

W. L. C.

In re DUKE OF NEWCASTLE'S ESTATES.

PEARSON, J.
1883
May, 11, 23; *June* 20.

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2, 3, 6, 11, 17, 25, 33, 56, 60—*Minority of Tenant in Tail—Powers of Leasing—Sale and Exchange—Mining Leases—Surface Land apart from Mines—Application of Rents—Proceeds of Sale—Conflict between Settlement and Act.*

Upon a summons under the *Settled Land Act* to obtain the opinion and direction of the Court as to the effect of the Act upon certain clauses in a settlement where an infant tenant in tail was entitled to possession, the following questions were decided:—

1. The settlement gave the trustees power during the minority of any person entitled to possession to receive and apply rents and profits in management of estate and maintenance of infant, and to accumulate and apply the surplus in paying off charges or in purchase of real estate to be settled to the same uses:—

Held, that the rents and profits received by the trustees during the minority were to be treated in manner directed by the settlement and without regard to the Act.

2. Power in the settlement to the trustees with the consent of tenant for life, if of age, and if not of his guardians, to sell or exchange:—

Held, that this power was exercisable by the trustees during the minority at the request and by the direction of the guardians of the infant tenant in tail.

3. Power in the settlement for the guardians during minority to grant leases for twenty-one years, building leases for ninety-nine years, and mining leases for sixty years:—

Held, that this power was exercisable during minority by the guardians with the consent of the trustees.

4. *Held*, that the rents derived from mining leases were to be applied by the trustees in manner directed by the settlement, as coming within the term "contrary intention" expressed in the 11th section of the Act.

5. *Held*, that there being no power in the settlement to sell surface land apart from minerals the trustees could exercise that power under sect. 17 of the Act; and this being an execution of a statutory power, the consent of the guardians would not be necessary.

THIS was a summons taken out under sect. 56, sub-sect. 3, of the *Settled Land Act*, 1882, by Lord *Edward W. P. Clinton* and Lord

PEARSON, J. 1883 *In re* DUKE OF NEWCASTLE'S ESTATES.

Lyttelton, the trustees of the settlement of the Duke of *Newcastle's* estates dated the 17th of June, 1856, for the opinion, advice, and direction of the Court upon the following questions:—

(1.) Whether the rents, issues, and profits of the manors, hereditaments, and premises comprised in the said settlement and received by the applicants as trustees thereof during the minority of any person entitled for life or as tenant in tail male under the said settlement, or any and what part of such rents, issues, and profits, are or is to be treated as capital moneys arising under the said Act, or in some other and what manner.

(2.) Whether the consent of the guardians of an infant tenant for life in tail male is necessary to enable the said trustees to exercise the powers, to make sale, alien, or dispose of, or to convey in exchange or by way of partition, the hereditaments comprised in the said settlement, and to enfranchise any copyhold or customary lands and hereditaments comprised in the said settlement.

(3.) Whether the power for the tenants for life or in tail male of the settled estates to grant leases for twenty-one years, building leases for ninety-nine years and mining leases for sixty years, is exercisable during their minority by the said trustees or by their guardians, or by some other or what persons.

(4.) Whether any and what portion of the rent arising under a mining lease ought to be set aside as capital money arising under the said Act.

(5.) Added by amendment—Whether the consent of the testamentary guardians of the infant tenant in tail is necessary to an exercise by the trustees of their statutory powers under the *Settled Land Act*, 1882, of selling surface land apart from minerals.

That the costs of this application may be directed to be taxed as between solicitor and client, and that the same when taxed may be paid out of the property subject to the said settlement.

The settlement of the 17th of June, 1856, contained, in addition to powers for jointuring and charging portions and for the appointment of new trustees, the following powers:—

(1.) Power to the then trustees, the Right Honourables *Sidney Herbert* and *W. E. Gladstone* (in whom was vested a term of 120 years), after the death of *Henry Pelham* Duke of *Newcastle*, during the minority of any person entitled to the possession or the receipt

of the rents of the settled estates, to enter into the possession of and to manage the same, to apply the net rents for maintenance of the mansion-house, to employ servants to rebuild, repair, or improve, to erect new buildings, to insure, to invest the surplus rents and accumulate at compound interest, to apply the accumulated fund in payment off of charges on the settled estates, or in the purchase of real estate to be settled to the uses and upon the trusts of the settlement, to employ agents, and to hold Courts. This power was exercisable without the consent of any person.

(2.) Powers to the same trustees at the request and by the direction of the tenant if of age, and if not of his guardians, to make sale or to convey in exchange or by way of partition.

(3.) Power to the tenants for life of the settled estates, and during their minority for their guardians, to grant leases for twenty-one years, building leases for ninety-nine years, and mining leases for sixty years.

The effect which it was supposed the *Settled Land Act*, 1882, would have upon these particular powers was set out as follows:

(1.) It would appear that there is some conflict between the settlement and the provisions of the Act, inasmuch as the expenditure which the trustees are thereby authorized to make out of rents, or at any rate some portion of it, might be held to come within the "improvements" mentioned in sect. 25 of the Act which are payable out of capital.

(2.) These powers are by the Act given to the tenant for life, and there is much difficulty in determining whether the tenant for life can exercise them under sect. 3, or whether the trustees are notwithstanding, under the words of sect. 56, sub-sect. 2, to exercise them.

(3.) The settlement and the Act seem to agree as to the duration of the leases, but to differ as to the persons who are to grant the leases during the minority of the tenant for life.

According to the settlement the guardians of the infant tenants for life are to grant the leases; according to the Act, the trustees of the settlement (sect. 60) are to grant them on their behalf, and it was thought that the trustees of this settlement were trustees within the meaning of the Act for the purposes of the Act (sect. 2, sub-sect. 8).

PEARSON, J. 1883 *In re* DUKE OF NEWCASTLE'S ESTATES.

A further question arises as to whether a portion of the rents under a mining lease should not be set aside as capital under sect. 11 of the Act.

It was considered that the trustees were trustees within the meaning of the Act, and were the proper persons during the infancy of a tenant for life to grant leases on his behalf, and that the guardians were not concerned in the matter.

Cookson, Q.C., and *E. S. Ford*, for the trustees of the settlement:—

We come to the Court under sect. 56, sub-sect. 3, of the *Settled Land Act*, for the opinion and direction of the Court as to the execution of the trusts in the settlement of the Duke of *Newcastle's* estate made in June, 1856. The present Duke, who is an infant, is tenant in tail under that settlement, and is therefore a limited owner within the definition of the Act, and for this purpose he is in the same position as if he were the tenant for life. We now raise questions upon three different sets of powers, the power in the trustees of management during minority, the power of leasing, and of sale and exchange and partition, and enfranchisement. Those are all the powers exercisable by the trustees or testamentary guardians, and the question is, how far these powers conflict with the provisions of the Act. In cases of conflict between the settlement and the Act it is provided by the 56th section, sub-sect. 2, that the provisions of the Act are to prevail. We submit that in this case there is the conflict spoken of in the Act. But supposing, as the Respondents contend, the powers are independent of each other, can they be exercised contemporaneously, that is, can the powers be exercised at one time under the settlement and at another time under the Act. We may first take the power of leasing in the settlement, which is given to the tenant for life, and after his decease to the guardians of an infant tenant in tail. The present Duke being an infant, that power is given by the settlement to his guardians, but by sects. 6 and 60 of the Act those powers are exercisable by the trustees of the settlement, and not the guardians, and without their consent. It is for the Court to decide whether it was the intention of this Act to be cumulative in the sense of allowing

two separate donees of powers over the same subject-matter to exercise concurrently those powers. By the Act the only persons who have any control during minority are the trustees of the settlement.

We say that if under the settlement freer scope is given than under the Act, then the settlement is to prevail, but not so if larger powers are given by the Act. So in respect of mining leases, it is more beneficial for the tenant for life to have the power exercised under the Act, because then he gets one-fourth of the proceeds, while under the settlement the whole is to be capitalised. The question is, whether the trustees of the settlement are the persons to exercise the powers of leasing by virtue of the 60th section of the Act, or whether the testamentary guardians of the infant Duke are the persons to exercise those powers. We say that there being a conflict between the settlement and the Act, it is for the trustees to act under the statute.

As to the powers of sale and exchange, the question is, whether the consent of the guardians of an infant tenant for life, which includes a tenant in tail, is necessary to enable the trustees to exercise the powers. By virtue of sects. 3, 58, and 60 of the Act the powers are vested in the trustees absolutely, that is: by sect. 3 the powers are vested in the tenant for life, by sect. 58 the tenant for life and the tenant in tail are made equivalent for this purpose, and by sect. 60, where the tenant in tail is an infant, then the trustees of the settlement are to exercise them on his behalf. Under the settlement the trustees are the persons who have the power, but they are fettered and can only exercise it with the consent of the guardians, and the question is, whether that consent is necessary, since the Act says where there is a direct conflict the Act must prevail. Then as to the destination of the money arising from sale of an estate. Under the settlement it is more limited than under the Act, therefore the wider destination prescribed by the Act must be applied. The same construction must be put upon the powers of leasing as of sale and exchange.

PEARSON, J.:—I think there is not much doubt that the intention of the Act in a case of this kind is to give the tenant for life

PEARSON, J. 1883 *In re* DUKE OF NEWCASTLE'S ESTATES.

the larger benefit. Looking at all the provisions of the Act, I should be totally ignoring the provisions of it if I did not hold that.

Cookson, Q.C.:—The only remaining question is, whether the rents and profits of the estates during minority, or what part thereof, are to be treated as capital. By the settlement the trustees, after providing for necessary expenses, are to lay out the surplus in the purchase of lands, there is no clause as to management of estates in the Act, therefore the management clauses in the settlement will continue.

PEARSON, J.:—Yes, that will be so.

Cozens-Hardy, Q.C., and *Lake*, for the guardians:—

There are only two questions which concern the guardians, and we submit that nothing has happened which takes away their power. First, as to the leasing power. The guardians have that power vested in them during minority, and the power of sale is vested in the trustees. The first is an express power identical with those contained in the Act, and we have to consider the 56th and 60th sections of the Act read together. It is reasonably clear that it was not the intention of the Act to destroy the powers contained in the settlement, for purposes identical with those given in the Act, and the illustration contained in clause 2 of sect. 56 shews that. There is nothing in the circumstances of this case to prevent the power being exercised. Under the Act the tenant for life has power to lease, and we say that where under the settlement there is a power of leasing identical with the Act, the tenant for life has not the power of leasing, but the trustees have the power with the consent of the tenant for life. That is the necessary meaning of clause 1 of sect. 56. The second clause deals only with a case where there is a tenant for life who intends to exercise the power given under the Act, which in this case he cannot do because he is an infant. An infant tenant for life cannot exercise the power of leasing, and therefore we are not within clause 2, because the only effect of that clause is, that instead of destroying the power of the trustees you preserve that power, but put upon them the fetter of requiring the consent of

the tenant for life. We have no tenant for life in this case who is exercising, or intending to exercise the power, and he cannot do it, therefore we are not bound to consider whether any consent can be given by the tenant for life as is provided by clause 2 by way of substitute for the power which is being taken away from him. We say that the power of leasing conferred upon the guardians of the minor is left intact by clause 1, and there is no conflict whatever, because the only conflict contemplated is between the provisions of the settlement and of the Act relative to a matter in which the tenant for life exercises, or desires to exercise, the power.

But there is another reading of sect. 56. Suppose your Lordship should be of opinion that sub-sect. 2 applies, then it amounts to this—that the trustees are the persons to execute the power, but with the consent of the tenant for life, and there is nothing to prevent a minor who is a tenant for life from consenting. That was discussed by the late Master of the Rolls in the case of *In re Cardross's Settlement* (1). There is nothing in this Act to import that the consent must be that of a tenant for life who is of full age. There is another way in which the matter may be taken. Assuming the Court is against us on the first point, we say the trustees of the settlement can exercise, on behalf of the infant, the consent which is required by clause 2. So that the guardians may exercise the power of leasing vested in them by the settlement with the consent of the trustees on behalf of the infant.

Again, as to clause 2, the only conflict there intended, is as to the matter in respect of which the power is to be exercised—not as to the persons. It is conceded on both sides that there is no conflict here as to the subject-matter, and that being so, is any consent of the tenant for life required?

An inference might be drawn from sect. 11 of the Act. Suppose the settlement confers a power upon the trustees of granting mining leases in terms which amount to a contrary intention, then there would be a conflict between the provisions of the settlement and the Act relative to the matter. If so, we suggest that the language of sub-sect. 2 would be met by holding that it applies to a case of that kind. Then as to the power of sale—

(1) 7 Ch. D. 728.

PEARSON, J. 1883 *In re* DUKE OF NEWCASTLE'S ESTATES.

what we say is that that power is intact, and it is not taken away by any of the provisions of the Act. It is one of the powers which are expressly reserved. It is a mere power to the trustees of the settlement to exercise the powers conferred upon the tenant for life. It is an enabling clause empowering them to exercise on behalf of the tenant for life, if they think fit, the powers which the tenant for life cannot exercise. There is nothing to deprive the guardians of the infant, of the rights conferred upon them by the settlement, to direct the mode in which the power of sale should be exercised.

Cookson, in reply.

[PEARSON, J.:—I wish to draw your attention to the argument of Mr. *Cozens-Hardy* as to the power of an infant to consent. I do not think that the case of *In re Cardross' Settlement* (1) has always been acceded to. There is a case of *In re D'Angibau* (2) where Lord Justice *Cotton* did not agree with it. His Lordship seemed to think that such a power could only be exercised by an infant where there was a manifest intention that it should be so exercised.]

Cookson:—*In re Cardross' Settlement* is consistent with the law which applies to legacies—for instance, if you say in a will "I give £100 to my nephew aged seventeen, and his receipt shall be a good discharge." That means notwithstanding his minority. And so here there might be a power vested in "my nephew who is nineteen that he may have power to lease the property." There must be strong words to shew the intention that the infant is to act, otherwise he cannot have that power.

PEARSON, J.:—

It is necessary for me in this case to give my opinion upon this Act with the greatest possible diffidence. The Act is a new Act which we shall have to interpret for the first time, because it has only just come into operation, and no one feels more than I do the great difficulty of interpreting this Act correctly, and avoiding mistakes which may affect titles hereafter. I have endeavoured, however, during the course of the argument, and by

(1) 7 Ch. D. 728. (2) 15 Ch. D. 228.

turning the matter over in my own mind in the interval between the former argument of this case and the present one, to understand the Act as well as I can. I now come to the conclusion that the purport and object of the Act is to grant to a tenant for life very large powers for his own benefit, and I desire to construe the Act in that spirit. In the present case the tenant for life is tenant in tail and an infant. There are large powers of leasing and sale, which are the only powers I have to deal with on the present occasion. The powers of leasing are substantially the same as the powers under the Act. It is not wished to grant a lease contrary to the provisions of the settlement, or in extension of the powers given by the provisions of the settlement. It is not necessary, therefore, to refer to the powers of the Act in order to enable the lease which it is desired to grant to be granted. The lease could be granted under the powers of the settlement if this Act had never passed. The difficulty is upon referring to the Act to know exactly who are the persons who ought now to grant a lease, and what, if any, consent is necessary to the exercise of the power. The power in the settlement to grant a lease is given to the guardian or guardians for the time being of any person under the age of twenty-one years. If, therefore, the Act had not passed, the guardian or guardians for the time being of the present Duke would be the persons entitled to grant the lease. The question is whether or not there is anything in this Act which prevents them from granting a lease, and renders it necessary that the lease should be granted by other persons, that is to say by the trustees of the settlement under the Act.

The only two sections which have any very important bearing upon this case with regard to that, are the 56th and the 60th. I will take the 60th first. "Where a tenant for life, or a person having the powers of a tenant for life under this Act, is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life under this Act, the powers of a tenant for life under this Act may be exercised on his behalf by the trustees of the settlement." If, therefore, this lease were to be granted under the provisions of this Act, and entirely independent of the provisions of the settlement, the trustees of the settlement under sect. 60 would be the proper persons to grant

PEARSON, J. 1883 *In re* DUKE OF NEWCASTLE'S ESTATES.

the lease; but, as I have already stated, it is proposed to grant this lease under the powers of the settlement, assuming that the powers of the settlement still exist. Do they or not exist, and have the persons who have power under the settlement still the authority given to them by the settlement to grant this lease? The first clause of sect. 56 seems to me to be very plain. It is this: "Nothing in this Act shall take away, abridge, or prejudically affect any power for the time being subsisting under a settlement, or by statute or otherwise, exercisable by a tenant for life, or by trustees with his consent, or on his request, or by his direction, or otherwise; and the powers given by this Act are cumulative." I read that to mean this—that it is not intended to take away from the trustees named in any settlement powers given to them by that settlement, and that if all parties are contented to exercise those powers, those powers may still be exercised; but if the powers in the settlement are more restricted than the powers in the Act, then the Act says that the provisions of the Act or the powers given by the Act are cumulative, that is to say, that the powers in the Act so far as they give larger authority than is given by the trusts of the settlement may be exercised in the manner prescribed by the Act. That, as it seems to me, makes that clause intelligible and makes both parts of it perfectly harmonious. The 2nd sub-section, I confess, raises some difficulty. I do not think there is much difficulty with regard to the first part of it. The first part says this: "But, in case of conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant for life exercises or contracts or intends to exercise any power under this Act, the provisions of this Act shall prevail." That as I read it means, that in any case where the tenant for life is desirous of exercising the powers given to him under the settlement, or given to him under the Act, if the powers under the settlement are less beneficial to him—are less extensive than the powers given to him by the Act—he is entitled to exercise the power under the Act notwithstanding any restriction contained in the settlement. But the latter part of that section goes, as it seems to me, away from the case altogether of a tenant for life who is exercising the power, and it deals with

the case where trustees are exercising the power; and it seems to me that it is meant to be an illustration of what is intended by the whole spirit and scope of the Act, which was, as I have said, to give larger powers to the tenant for life than he had before; and it prescribes this: that in all cases "notwithstanding anything in the settlement, the consent of the tenant for life shall by virtue of this Act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exercisable for any purpose provided for in this Act." I read that therefore to mean, that amongst other things that are cumulative, the consent of the tenant for life must now be added to the exercise of any power for leasing or sale by the trustees of the settlement, although not required by the settlement. I should come, therefore, to the conclusion that the trustees of the settlement could not exercise a power of sale, or a power of leasing, absolutely at their own discretion by the terms of a settlement, without the consent of the tenant for life.

Now in this case the tenant for life is an infant. The question is, first of all, can the infant give that consent? The second one is, if he cannot give that consent, is there any person, or are there any persons who can give consent for the tenant for life? I cannot help thinking that in construing this Act I ought to give the terms of the Act the widest construction I can give, consistently with the English language, so as to render all the clauses in the Act operative; and under sect. 60 I find that the trustees of the settlement are to have the power of the tenant for life under this Act. Now this, which you may call a fetter upon the exercise of the discretion by the trustees, is also, as it seems to me, a power given to the tenant for life to consent, or refuse his consent, to the exercise of the discretion vested in the trustees. I think, therefore, under the 60th section, the trustees of the settlement can consent on behalf of the tenant for life; and it enables the trustees to exercise the trusts under the settlement with that consent. I am confirmed in that by the section to which Mr. *Hardy* drew my attention—the 33rd section, which is an exceedingly beneficial one, and which directs, "Where under a settlement, money is in the hands of trustees, and is liable to be laid out in the purchase of land to be made subject to the settle-

PEARSON, J. 1883 *In re* DUKE OF NEWCASTLE'S ESTATES.

ment, then in addition to such powers of dealing therewith as the trustees have independently of this Act, they may, at the option of the tenant for life, invest or apply the same as capital money arising under this Act." Either there is some person who can exercise that option, or the power is not capable of being exercised during the minority of the tenant for life. I think it is impossible to hold that it was the intention of this Act to say that such a beneficial power as that might be exercised where there was an adult tenant for life, while it gave no option if it should be exercised during the minority of the tenant for life. I am again obliged to fall back upon the 60th section, and I read the 60th section—giving the trustees of the settlement who are able to exercise them the powers of the infant tenant for life under the Act—as conferring upon them a power to exercise the option for the tenant for life. I think in either case it was intended, where there was an infant, that the trustees of the settlement should be able to do whatever the infant was authorized to do under this Act, and so deciding, I think that I harmonize the sections of the Act; at all events sufficiently to make the Act reasonable and intelligible. I come, therefore, to the conclusion that the power for leasing under this settlement may still be exercised by the guardians, but with the consent of the trustees of the settlement.

The same observations of course will apply to the power of sale, which in this case is vested in the trustees named in the settlement, and is to be exercised by them with the consent of the testamentary guardians. It was said in argument, and not unfairly, that inasmuch as the testamentary guardians must consent under the settlement, to make the trustees of the settlement also consent would be to give two guards for the infant; I agree that that is so. All I can say is, that the Act has said, as has been justly observed, the powers are not to be excised from the settlement, that the powers of the trustees are not to be abridged or restricted; and I hold, therefore, that the powers of sale still remain to be exercised in the same way as they are directed to be exercised by the terms of the settlement itself, but with this additional provision, that the trustees of the settlement must now consent to the exercise of them under the 60th section.

Therefore there will be a slight variation as to the leasing and

sales powers. The leasing power will be exercised by the guardians with the consent of the trustees; and the power of sale will be exercised by the trustees, not with the consent of the guardians but following the settlement words, "at the request and by the direction," that is, it will be consent in one case and direction in the other.

June 20. The case came on again for the purpose of having a supplemental point decided.

Cookson, Q.C.:—

Your Lordship has already decided that the powers of sale, exchange, partition, and enfranchisement contained in the settlement are to be exercised during the minority of the infant by the trustees of the settlement, but with and at the request and by the direction of the testamentary guardians of the infant Duke. The point we now desire to put is this: The settlement contains a power to sell, but not to sell the surface apart from the minerals. The *Settled Land Act* provides that the surface may be sold apart from the minerals. Now the *Confirmation of Sales Act*, which was passed in 1862, has a bearing upon this question, but it does not authorize trustees who have no power to sell the surface apart from the minerals, to do it *proprio motu*. They must come to the Court to do it, and must make a special application in every case to satisfy the Court that it is proper to be done. That is what we wish to avoid. But under the *Settled Land Act*, 1882, there is a general power, by sect. 17, to sell the surface apart from the minerals; and it is upon that section, in connection with the settlement, that the question arises. The 17th section is this, "A sale, exchange, partition, or mining lease, may be made either of land, with or without an exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals, and in any such case with or without a grant or reservation of powers of working." Now if the trustees want to exercise the statutory power, I have to ask the Court to say there are no grounds for requiring the consent of the testamentary guardians. Where there is an infant tenant in tail the trustees of the settlement are to exercise the powers generally: sect. 60. Therefore

PEARSON, J. 1883 *In re* DUKE OF NEWCASTLE'S ESTATES.

the trustees of the settlement are the persons now to exercise the statutory power of sale, and they can by sect. 17 reserve the minerals. Therefore the question is, whether the fetter which the settlement imposes, that is, with the consent of the testamentary guardians of the infant, applies to the case of an exercise of the statutory power of sale reserving the minerals, which is a power not to be found in the settlement.

PEARSON, J.:—

It comes to this: If there were no powers in the settlement the trustees would act under the *Settled Land Act* altogether; and then they would have full power given to them under that Act. You are now going to exercise a power not in the settlement at all, and it does not in the least matter whether there are other powers in the settlement or not. You are going to act under the *Settled Land Act*, and the Court may consent to what you ask. Therefore the supplementary question may be answered in this way.—That in cases where the trustees desire to sell the surface apart from the minerals it is competent for them to do so under sect. 60 of the Act in this case without the consent of the testamentary guardians.

Cookson, Q.C.:—

Then there is a further question as to how the rents under the mining leases are to be dealt with. The question is, "Whether any and what portion of the rent arising under a mining lease ought to be set aside as capital money arising under the Act." That turns wholly upon sect. 11, which is this, "Under a mining lease, whether the mines or minerals leased are already opened or in work or not, unless a contrary intention is expressed in the settlement, there shall be from time to time set aside, as capital money arising under this Act, part of the rent as follows, namely, where the tenant for life is impeachable for waste in respect of minerals, three-fourth parts of the rent, and otherwise"—that is where he is not impeachable for waste—"one-fourth part thereof, and in every such case the residue of the rent shall go as rents and profits." In this case he is not impeachable for waste. We were under a misapprehension when the case was last before the Court in saying that there would be nothing to set aside if the

tenant for life was not impeachable for waste, because in fact it would be in that case one-fourth of the money derived from the mining lease, unless your Lordship should be of opinion that a contrary intention is expressed in the settlement.

Lake, for the guardians:—

I should submit that there is a contrary intention expressed in the settlement. The trustees are to receive all the rents during the minority of the tenant in tail, and to apply them to certain purposes which are directed by the settlement. They are first of all to pay the expense of management, and then to keep down any annual sums, then to maintain the infant, and then to repair the manor and the farmhouses, and rebuild farmhouses, and invest the balance in the funds, and stand possessed of the accumulated funds upon trust when the minority has come to an end to discharge incumbrances or to purchase lands to be held under the limitations of the settlement. That clause includes all rents, whether rents from a mining lease or elsewhere.

Cookson:—

We should be glad if the Court came to that conclusion, and in that case sect. 11 will not be applicable to the distribution of the rents arising from a lease of mines.

PEARSON, J.:—

I think there is a contrary intention expressed in the settlement, therefore the answer will be—that the rents under the mining leases are payable to the trustees to be applied by them in accordance with the trusts of the settlement.

The summons must be amended by inserting the supplementary question, and the order should be dated as of this day.

The order was in these terms:—

The Judge is of opinion that—

(1.) That the rents, issues, and profits of the manors, hereditaments, and premises comprised in the above-mentioned settlement and received by the applicants as trustees thereof during the minority of any person entitled for life, or as tenant in tail male under the said settlement, ought to be treated in manner

PEARSON, J. 1883 *In re* DUKE OF NEWCASTLE'S ESTATES.

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PEARSON, J. 1883 *In re* DUKE OF NEWCASTLE'S ESTATES.

directed by the said settlement and without regard to the *Settled Land Act*, 1882.

(2.) That the powers to make sale, alien, or dispose of, or to convey in exchange, or by way of partition, the hereditaments comprised in the said settlement, and to enfranchise any copyhold or customary lands and hereditaments comprised in the said settlement are exercisable by the applicants as trustees of the said settlement at the request and by the direction of the testamentary guardians of the said infant tenant in tail during his minority.

(3.) That the powers contained in the said settlement to grant leases for twenty-one years, building leases for ninety-nine years, and mining leases for sixty years are exercisable during the minority of the infant tenant in tail by his testamentary guardians with the consent of the said trustees.

(4.) That the rents under mining leases granted under the settlement or under the Act are to be dealt with in manner provided by the settlement and to be paid to the trustees of the settlement to be dealt with by them accordingly.

(5.) That the consent of the testamentary guardians is not necessary.

And it is ordered that the costs of all parties of this application be taxed as between solicitor and client, and that the same when taxed be paid by the trustees out of any capital moneys in their hands.

Solicitors: *Rickards & Son; Lake, Beaumont, & Lake.*

T. W. G.

PEARSON, J. 1883 *July* 3.

In re EARLE AND WEBSTER'S CONTRACT.

[1883 E. 596.]

Settled Land—Absolute Trust for Sale—Sale by Trustees—Consent of Beneficiaries—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 56, 63.

In determining whether land vested in trustees on an absolute trust for sale is subject to the provisions of sect. 63 of the *Settled Land Act*, 1882, the Court must look simply at the instrument which created the trust, and if at the time when a contract for sale is entered into by the trustees, there is no person who, by virtue of the provisions of that instrument, is entitled to the income of the money arising from the sale, or of the land until sale, for his life, or any other limited period, sect. 63 does not apply, but the trustees can exercise the trust for sale just as they could have done prior to the passing of the Act.

ADJOURNED SUMMONS.

This was a summons under the *Vendor and Purchaser Act*, 1874.

Thomas Earle, by his will dated the 21st of October, 1820, devised all the residue of his real estate to trustees in fee, upon trust for sale as therein mentioned, and to convey the same to

the purchasers thereof, and to receive the purchase-moneys for the same, with power to give receipts to the purchasers. And on further trust, after the death of the testator's wife, to whom he gave the income of the residue of his estate for her life, to divide the residue in certain specified proportions among his five children, but he directed that the shares of his daughters should be held upon trusts for the benefit of themselves respectively for life, with remainders to their issue respectively. Until sale the rents of the real estate were to be applied as the income of the proceeds of sale would be applicable after sale. The testator died in 1822. On the 12th of February, 1883, the trustees of the will entered into a contract for a sale of a part of the testator's real estate. At this time the testator's widow was dead, and all his five children were also dead, and the persons entitled to or interested in the property or the proceeds of sale thereof were persons who derived title either through the testator's sons, or by virtue of the limitations of the daughters' shares, or by virtue of sub-settlements which had been made of parts of some of the daughters' shares. The interests created by the will had all vested absolutely. The purchasers objected that, having regard to the provisions of sect. 56, sub-sect. 2, and sect. 63 of the *Settled Land Act*, 1882 (1), a good title to the property could not be made unless

(1) Sect. 56 provides that, "(1.) Nothing in this Act shall take away, abridge, or prejudicially affect any power for the time being subsisting under a settlement, or by statute or otherwise, exerciseable by a tenant for life, or by trustees with his consent, or on his request, or by his direction, or otherwise; and the powers given by this Act are cumulative.

"(2.) But, in case of conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant for life exercises, or contracts or intends to exercise, any power under this Act, the provisions of this Act shall prevail; and accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this Act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exerciseable for any purpose provided for in this Act."

Sect. 63 provides that, "(1.) Any land, or any estate or interest in land, which under or by virtue of any deed, will, or agreement, covenant to surrender, copy of Court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, is subject to a trust or direction for sale of that land, estate, or interest, and for the application or disposal of the money to arise from the sale, or the income of that money, or the

PEARSON, J. 1883 *In re* EARLE AND WEBSTER'S CONTRACT.

all the persons who were at the date of the agreement for sale beneficially entitled to the income of the property concurred in the sale, and were parties to the conveyance to the purchasers. The trustees insisted that they could make a good title without the concurrence of any of the beneficiaries.

The present summons was taken out by the trustees, asking a declaration that they as trustees of the will were entitled to convey the property comprised in the contract to the purchasers, and that the concurrence of the persons beneficially entitled to the income arising from the property was not necessary.

Cozens-Hardy, Q.C., and *W. Phipson Beale*, for the trustees:—

If the purchasers are right in their requisition the result of the *Settled Land Act*, the object of which was to make land more readily saleable, will be to make land in such a case as the present, unsaleable. The difficulties which existed before conveyancers had invented a trustees' receipt clause, and when a purchaser from trustees was bound to see to the application of his purchase-money, will be brought into existence again. This cannot be the proper construction of sect. 63. The object of that section was to prevent

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income of the land until sale, or any part of that money or income, for the benefit of any person for his life, or any other limited period, or for the benefit of two or more persons concurrently for any limited period, and whether absolutely, or subject to a trust for accumulation of income for payment of debts or other purpose, or to any other restriction, shall be deemed to be settled land, and the instrument or instruments under which the trust arises shall be deemed to be a settlement; and the person for the time being beneficially entitled to the income of the land, estate, or interest aforesaid until sale, whether absolutely or subject as aforesaid, shall be deemed to be tenant for life thereof; or if two or more persons are so entitled concurrently, then those persons shall be deemed to constitute together the tenant for life thereof; and the persons, if any, who are for the time being under the settlement trustees for sale of the settled land, or having power of consent to, or approval of, or control over the sale, or, if under the settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this Act, are for purposes of this Act trustees of the settlement.

"(2.) In every such case the provisions of this Act referring to a tenant for life, and to a settlement, and to settled land, shall extend to the person or persons aforesaid, and to the instrument or instruments under which his or their estate or interest arises, and to the land therein comprised," subject to certain exceptions and qualifications which it is unnecessary now to state.

attempts to defeat the previous provisions of the Act by means of a trust for sale, and the effect of it is that the consent of persons who have limited interests under the trust of sale must be obtained to an exercise of the trust by the trustees. It does not mean that in every case of a trust for sale the trustees cannot sell without the consent of the persons beneficially interested in the proceeds of sale. In the present case, the interests now existing under the trust are absolute, not limited, interests. In determining what is the settlement under sect. 63, no sub-settlement of the proceeds of sale is to be taken into account. Sect. 63 extends the authority of a tenant for life, but it does not cut down the right of the trustees for sale, unless that right is cut down by sub-sect. 2 of sect. 56. But that sub-section applies only to the exercise by the trustees of a settlement of any power conferred by the settlement; it does not apply to the exercise of a trust for sale.

Whitley, for the purchasers:—

By virtue of sect. 63, this is settled land, and the persons entitled to the income are to be deemed tenants for life under the Act. The question whether it is settled land is to be determined at the time when the settlement takes effect, *i.e.*, in the present case, at the death of the testator. The land then became settled, and nothing has since happened to change its character. The principles on which the Act ought to be construed are explained in your Lordship's judgment in *In re Duke of Newcastle's Estates* (1).

PEARSON, J.:—

I hope I am not being led away by my feelings of what convenience requires in the construction of this section. I have endeavoured to construe it as if I had simply the words before me, and as if it were a matter of utter indifference to Her Majesty's subjects whether it is construed one way or the other. The conclusion at which I have arrived is this. In the first place, I think that the words "the instrument or instruments under which the trust arises shall be deemed to be a settlement," make it

(1) *Ante*, p. 129.

PEARSON, J. 1883 *In re* EARLE AND WEBSTER'S CONTRACT.

imperative on the Court to look simply at the instrument which creates the trust for sale. The result of that is this, that though, under the previous sections of the Act relating to property in general, a settlement may be composed of more than one instrument, for instance, of a will and a marriage settlement executed by some person taking beneficially under the will—which together would create the settlement intended to be dealt with by the Act, in this section, which deals with a trust for sale, the instrument which is to be considered the settlement, is, I think, the one instrument (or it may be the two instruments) which contains or contain the trust for sale.

Under these circumstances, the one instrument to which I must look in the present case, is the will of *Thomas Earle*, and I find there an absolute trust for sale introduced for the purpose of converting the real estate out and out. There can be no doubt that, if this Act had not been passed, the trustees under the will could sell the property and give an absolute receipt to the purchaser for the purchase-money, and the only question submitted to me is this, whether, under the 63rd section of the Act, I am bound to hold that these trustees can no longer give a receipt for the purchase-money, but that all the persons beneficially interested under the will must concur in the sale in order to make it valid.

Under the will the property is to be converted out and out, and on the death of the widow (which happened some time since), the moneys to arise from the conversion are to be divided into fourteenths, some of the children taking four fourteenths, some three fourteenths, and some two fourteenths. I am informed that all the children are dead, but in some cases there are grandchildren, and where there are no grandchildren the children's shares of the sale moneys have been in some way or other absolutely dealt with and disposed of. The result of that is that, as section 63 goes on to deal with the case of a trust for sale and for the application of the money to arise from the sale, or the income of that money, or the income of the land until sale, "for the benefit of any person for his life, or any other limited period, or for the benefit of two or more persons concurrently for any limited period, and whether absolutely, or subject to a trust for accumulation of income for

payment of debts or other purposes, or to any other restriction," I am dealing with an instrument under which there is now no person entitled for life or for any limited period, because, the widow being dead, the children's shares have become absolutely vested, and whether they have been since sold or settled can make no difference, because the shares have been taken absolutely under the only instrument at which I can look.

PEARSON, J. 1883 *In re* EARLE AND WEBSTER'S CONTRACT.

Under these circumstances, I am of opinion that sect. 63 has no application, and that the trustees may sell, just as they could have done before the Act, and give a proper receipt for the purchase-money. Therefore I must answer the question in this way, that the vendors can make a good title without the concurrence of any other persons.

Solicitors for all parties: *Sharpe, Parkers, & Co.*, agents for *Laces, Bird, & Co., Liverpool.*

W. L. C.

In re LONDON AND STAFFORDSHIRE FIRE INSURANCE COMPANY.

PEARSON, J. 1883 *June*, 19, 20.

Company—Rectification of Register of Members—Misrepresentation—Notice—Delay—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 35; *Table A, Articles* 95, 97 [*Revised Ed. Statutes, vol xiv., pp.* 210, 260].

The provisions of articles 95, 97 of Table A to the *Companies Act*, 1862, for the service of notices by a company on its members, apply only to notices relating to the ordinary business of the company, and service in the way there pointed out is not sufficient for the purpose of fixing a shareholder with knowledge of a misrepresentation which would entitle him to repudiate his shares, unless he had been guilty of laches after notice of the misrepresentation.

ADJOURNED SUMMONS.

This was a summons by *Peter Ure Wallace*, asking that the register of members of this company might be rectified by striking out his name as the holder of forty shares in the company. The ground of the application was that the applicant had been induced to apply for and take the shares on the faith of a prospectus issued by the company, which contained a material misrepresentation. It was admitted that the misrepresentation was

PEARSON, J. 1883 *In re* LONDON AND STAFFORDSHIRE FIRE INSURANCE COMPANY.

made by the directors *bonâ fide*, in consequence of a mistake of fact.

The company was formed in the year 1870. In November, 1880, the directors published a prospectus, inviting subscriptions for a fresh issue of shares. This prospectus stated that "the business of the company has grown during the brief period of its establishment to the large premium income of over £110,000 a year. Dividends of not less than 5 per cent. have been uniformly paid, and *the surplus assets, as appear by the last balance sheet, amount to upwards of* £10,000." On the faith of this prospectus, *Wallace* applied for sixty shares on the 30th of November, 1880, and forty shares were allotted to him on the 15th of December, 1880.

By the balance sheet and accounts for the year 1879, which were presented by the directors, with their tenth annual report, to the annual general meeting of the shareholders on the 17th of June, 1880, it appeared that the balance in favour of the company on the profit and loss account for the year 1879, amounted to £10,137 16*s.* 5*d.* Shortly after the capital of the company had been increased by the issue of the new shares, the directors discovered that on making up the balance sheet for 1879, an under-estimate had been made of the outstanding losses, and an over-estimate of the outstanding revenue for the year, the result of which was that, instead of there being a surplus of £10,000 in favour of the company, there was a deficit on the profit and loss account for 1879 of £5000. In the eleventh annual report, for the year 1880, which the directors prepared for presentation to the annual meeting of the shareholders which was to be held on the 28th of June, 1881, they stated these facts, and also that in order to rectify the estimates alluded to, the directors proposed to contribute from their own resources a sum of £15,000 for the benefit of the company as a going concern, and that a resolution would be submitted to the shareholders at the meeting confirming this arrangement. This report was printed, and a copy of it was on the 18th of June, 1881, sent by post to the registered address of every shareholder of the company. On the back of the report was printed a notice, dated the 17th of June, 1881, of the meeting intended to be held on the 28th of June.

The meeting was held on that day, but *Wallace* did not attend it. On the 13th of June, 1882, *Wallace* took out the present summons. He deposed that he first became aware of the misrepresentation in the prospectus in the month of May, 1882, when (amongst other things), he saw the report in a newspaper of a case in which the Court of Appeal, on the 8th of May, 1882, had decided that another shareholder named *Sturdy*, was entitled to have his name removed on the ground of the misrepresentation. *Wallace* swore positively that he never saw any copy of the directors' report for the year 1880, until the 3rd of July, 1882. The only evidence that he had received a copy of that report was an affidavit made by two clerks of the company, who stated that on the 18th of June, 1881, they posted a copy of the eleventh annual report to each of the shareholders of the company, addressed to him at his registered address.

The articles of association of the company provided that "a notice may be served by the company on any member, either personally or by sending it through the post in a prepaid letter addressed to such member at his registered place of abode;" and that "any notice, if served by post, shall be deemed to have been served on the day following that on which the letter containing the same was posted; and in proving such service it shall be sufficient to prove that the letter containing the notice was properly addressed and put into the post office."

In cross-examination, *Wallace* said he would not swear that he did not receive a notice of the meeting of the company of the 28th of June, 1881.

Haldane, for the summons:—

There can be no doubt that the misrepresentation (though it was made *bonâ fide*) was such as to entitle the applicant to have his name removed from the register, unless he has been guilty of any laches or delay which deprives him of his right. After the decision of the Court of Appeal the only question is whether the present applicant has delayed too long in making his application after he became aware of the facts. He never received or read the directors' report of June, 1881. It is not enough to shew that the applicant had the means of knowledge; it must be

PEARSON, J. 1883 *In re* LONDON AND STAFFORDSHIRE FIRE INSURANCE COMPANY.

shown that he had actual knowledge of the misrepresentation: *Redgrave* v. *Hurd* (1); *Stewart's Case* (2). A shareholder in a company is entitled to assume that any ordinary report or circular which is sent to him by the company is not intended to inform him that the directors have been making misrepresentations as to the condition of the company. He cannot be affected with constructive notice of the misrepresentation by merely shewing that he received a report of the directors which mentioned it. It must be proved that he read the report.

But, in the present case, there is no sufficient proof that *Wallace* received the directors' report in June, 1881. He swears that he did not.

Cookson, Q.C., and *Badnall*, for the company:—

We do not dispute the authority of *Redgrave* v. *Hurd*, but it does not apply. In *Stewart's Case*, the decision was only that a man who attended a meeting at which a variation between the prospectus and the memorandum of association of a company was pointed out, was not thereby affected with notice of other and more extensive variations which were not then pointed out. Of course a man who knows a small fraud which has been practised on him is not thereby fixed with notice of a greater fraud. There was enough to raise *Wallace's* suspicions long before he made this application: *Rawlins* v. *Wickham* (3).

It is impossible to prove that a man read a document which is traced to his possession; but if it is proved that he received it, the *onus* is then on him to prove that he did not become acquainted with its contents. Here, though *Wallace* at first swore that he did not receive the report, yet on cross-examination he declined to swear that he did not receive notice of the meeting in June, 1881, and, inasmuch as the notice of the meeting was printed on the back of the report, this is equivalent to an admission that he received the report. If he received notice of the meeting he had constructive notice of what took place at it: *In re Norwich Yarn Company* (4).

(1) 20 Ch. D. 1.
(2) Law Rep. 1 Ch. 574.
(3) 3 De G. & J. 304.
(4) 22 Beav. 143.

[PEARSON, J.:—I doubt whether that is in accordance with the decision of the House of Lords in *Spackman* v. *Evans* (1).]

PEARSON, J. 1883 *In re* LONDON AND STAFFORDSHIRE FIRE INSURANCE COMPANY.

Evans v. *Smallcombe* (2) shews that it is not necessary to bring home to any individual shareholder actual knowledge of what took place at a meeting. And *Phosphate of Lime Company* v. *Green* (3) is to the same effect. In *Lindley* on Partnership (4) it is said, "Absentees cannot effectually urge their ignorance of what took place at meetings which they might have attended had they thought proper so to do." The report of 1881 contained enough to shew that the balance sheet of 1879 was incorrect, and as *Wallace* after that stood by he cannot now be allowed to escape liability: *Lawrence's Case* (5); *Taite's Case* (6); *Heymann* v. *European Central Railway Company* (7); *Ashley's Case* (8); *Sharpley* v. *Louth and East Coast Railway Company* (9).

PEARSON, J.:—

The directors of this company, wishing to obtain further capital, issued a circular inviting subscriptions for new shares. By what I may call an accident they inserted in that circular a statement which was untrue. At the time when they did this they themselves did not know that it was untrue, but still it was a misrepresentation and a material misrepresentation of the state of the company at the time. I have not now to consider whether that misrepresentation was sufficient to justify all those persons who had subscribed for shares on the faith of it in retiring from the company, because the Court of Appeal has had the question before it in the case of another shareholder, and has come to the conclusion (by which of course I am bound) that the misrepresentation entitled those persons who had subscribed for shares on the faith of it to retire from the company and to reclaim their subscriptions, provided that they made their applications in due time. The only question, therefore, which I have now to consider is this, whether Mr. *Wallace* is debarred from the relief

(1) Law Rep. 3 H. L. 171.
(2) Ibid. 249.
(3) Ibid. 7 C. P. 43.
(4) 4th Ed. vol. i. p. 550.
(5) Law Rep. 2 Ch. 412.
(6) Ibid. 3 Eq. 795.
(7) Ibid. 7 Eq. 154.
(8) Ibid. 9 Eq. 263.
(9) 2 Ch. D. 663.

PEARSON, J. 1883 *In re* LONDON AND STAFFORDSHIRE FIRE INSURANCE COMPANY.

which he claims by laches, by the lapse of time, by his not coming forward at the earliest possible moment to make his claim to withdraw from the company.

Now the only reason why he should be barred is this. He subscribed for his shares in November, 1880, and he did not seek to retire until May, 1882. The only fact which is relied on as shewing that he has been guilty of laches is this. The directors discovered the misrepresentation which had been made, and, having made it honestly, endeavoured to do away with the effect of it with equal honesty. In their eleventh annual report, dated the 15th of June, 1881, they stated that this mistake had been made in the accounts for the year ending the 31st of December, 1879, and that the representation was about to be made good by the directors, who held themselves responsible for it. That report, it is said, reached the hands of Mr. *Wallace*, and was sufficient to inform him of all that he was entitled to know, and it is said that immediately after receiving it he ought, if he was so minded, to have claimed the return of his subscription. I should be very sorry to say a single word which might indicate that I differ in any way from that which has been laid down time after time in decided cases, viz., that a man is not at liberty to play fast and loose as to a misrepresentation of which he complains, to bide his time until he can see whether it is more for his benefit to remain in the society or to set himself free from it, and to come at any time when he thinks the balance is in favour of retirement and ask to be allowed to retire. Certainly in any case of that kind which comes before me I shall be guided by the authorities which are to be found in the books, and I shall hold that any man who claims to retire from a company on the ground that he was induced to become a member by misrepresentation, is bound to come at the earliest possible moment after he becomes aware of the misrepresentation. But the question on which I must decide the present case, and the only question which I have to consider, is this, Is there sufficient evidence to satisfy me that the report of the directors was received by Mr. *Wallace* in or about June, 1881?

Now, in my opinion, when those who have made a misrepresentation wish to resist a claim of this kind, the *onus* is upon

them to shew that notice of the misrepresentation was given to and received by the person whose claim they are resisting. The only evidence of notice in the present case is that the report was posted in the usual course of business by the clerks of the company. If I had to consider simply whether that was a good notice under the company's articles of association, which are for this purpose in substance the same as the regulations of Table A to the *Companies Act*, 1862, I should undoubtedly come to the conclusion that it was a good notice. But this is not a question of notice of anything in the ordinary course of the business of the company. As regards Mr. *Wallace*, it is said to be a notice of something which I may call outside the business of the company, a notice of a misrepresentation which had been accidentally made by the directors, a notice which is relied on as preventing him from raising a claim to be relieved of his shares by reason of that misrepresentation, on the ground that he ought to have made his claim with the greatest possible promptness after receiving the notice. I cannot think that the mere sending of the notice by post to Mr. *Wallace*, although it was a perfectly good notice for all the ordinary purposes of the business of the company, ought to be held without further evidence as a notice by which he can be bound in a case of this kind. He swears most distinctly in his affidavit that he did not receive that report, and he has repeated that statement. He has been cross-examined, and the only passage in his cross-examination on which great reliance has been placed on behalf of the company is this, that he declined to swear that he did not receive a notice of the annual meeting to be held in June, 1881. The notice of the annual meeting was printed on the back of the report, and it is said, that inasmuch as he will not swear that he did not receive the notice of the meeting, that is tantamount to an admission that he did receive the report. I differ entirely from that conclusion. I think that Mr. *Wallace* was swearing with very proper caution. I can easily conceive a man saying "I will not swear whether I received a notice of the annual meeting, because that is a thing which would easily pass from my mind. But the report is an entirely different thing; if I had received it I could not have forgotten it; I therefore am able to tax my memory on that point,

PEARSON, J. 1883 *In re* LONDON AND STAFFORDSHIRE FIRE INSURANCE COMPANY.

and I do swear most positively that I did not receive that report."

Under these circumstances I think that, the *onus probandi* as to notice being on those who resist Mr. *Wallace's* claim, my verdict must be "Not proven," and that verdict acquits him of any laches in the matter. There is nothing else in the case, except the simple fact that a misrepresentation was made, which the Court of Appeal has decided is sufficient to release him from his agreement to take shares, and I must make the order which he asks, to remove his name from the register of members of the company.

Solicitors for *Wallace*: *Barnard & Co.*
Solicitors for Company: *Argles & Argles.*

W. L. C.

PEARSON, J. 1883 *March* 5–20; *June* 27.

BADISCHE ANILIN UND SODA FABRIK *v.* LEVINSTEIN.

[1881 B. 5077.]

Patent—Chemical Process—Invalidity and Infringement—Scientific Expert to advise the Court—Secret Process—Known Chemical Equivalents—Production of similar Result.

In an action to restrain the infringement of a patent for producing colouring matters for dyeing and printing by means of a chemical process, described in the specification, there being two questions raised, viz., validity of the patent and infringement:—

Held, as to validity, that a man cannot have a patent for a principle alone, but may have one for a principle coupled with a process by which the principle may be carried into effect.

He can only claim to work out his process by means of materials known at the date of the patent; he cannot claim the use of materials discovered subsequently, and his specification will be construed with regard to this consideration.

Where there is contradictory evidence on a scientific question, the Court is at liberty to employ independent expert evidence to give advice upon which the Court may form its judgment.

The Court being of opinion that the Plaintiffs' principle was new, that the process was sufficiently described, and that it was workable for commercial purposes:—

Held, that the patent was valid.

On the question of infringement the Defendant alleged that in the

manufacture of his dyes he used a secret process entirely different from that of the Plaintiffs, and he was allowed to decline answering any questions in cross-examination which would disclose his secret process.

In the course of the arguments the Court being of opinion that the patent was valid, gave the Defendant leave to state his secret process *in camerâ*, and

Held, that where a patent is for a process arriving at a known result any person may use another process without its being an infringement; but where the patent is for a new result, coupled with an effectual process, the patentee is protected from the use of any other process for the same result. The Defendant had not invented new materials but had used the same materials and arrived at a similar result, though by a process different from that of the Plaintiffs and not known at the date of the patent, and this was an infringement.

The short-hand writer's notes, which would disclose the secret process, were ordered to be impounded in Court, with liberty to apply.

THE Plaintiffs, who were possessors of a patent for improvements in the production of colouring matters for dyeing and printing, brought this action for an injunction to restrain the Defendants from infringing their patent by making similar articles according to the processes described in the patent. The defence was that the patent was void altogether; but that if the patent was valid, the Defendant, Mr. *Levinstein*, had used a secret process in manufacturing his dyes which differed entirely from any process described by the Plaintiffs in their specification, and that consequently there had been no infringement of the patent.

The following mode of conducting the action, which was rendered necessary by the unusual character of the subject-matter, was adopted by the Court:—

Numerous witnesses were examined on both sides as to the manner in which the four different chemical processes described in the Plaintiffs' patent could be worked. When the Defendant, Mr. *Levinstein*, gave his evidence, he objected to answer any questions put to him in cross-examination which should have the effect of disclosing the secret process by which he conducted his operations.

Mr. Justice *Pearson* considered this objection to be reasonable, and allowed the examination to be continued upon that principle, giving the Defendant leave to decline answering any questions which would disclose his secret process.

After the hearing of the case had lasted for ten days, his

PEARSON, J. 1883 BADISCHE ANILIN UND SODA FABRIK v. LEVINSTEIN.

Lordship stated that in consequence of the conflicting nature of the evidence and the consequent difficulty of deciding a scientific question of this nature, he should not give judgment without having the evidence of an independent expert witness who would undertake to make such experiments as should be necessary for the purpose of advising the Court. Professor *Roscoe* was thereupon appointed, with the consent of both parties, to conduct these experiments, and the following instructions were given to him by the Court:

"A question has arisen in the trial of this action between the owners of the patent and the parties who are alleged to have infringed it, as to the sufficiency of the specification as regards the first process described in it. For the information of the Court Professor *Roscoe* is requested to perform the experiments which may be necessary to answer the questions hereafter stated, following exactly the directions contained in the example given.—'As an example of the manner in which this first process may be carried out, I proceed as follows: about ten pounds of naphthylamine are mixed with or dissolved in about two gallons of concentrated or strong muriatic acid, and about 100 gallons of cold water, and thereto an aqueous solution of nitrate of sodium is added containing about four and eighth-tenths pounds of pure nitrate of sodium, or as much as will be found necessary to convert the naphthylamine into its diazo compound, or into hydrochlorate of diazo-naphthaline. The solution thus obtained is added to an aqueous and strongly alkaline solution of about ten pounds of either of the two isomeric naphthols, or of mixtures of the same, when a dark red or brown precipitate will be produced consisting of oxyazo-naphthaline which is to be filtered, washed, and dried.' Professor *Roscoe* is requested to obtain oxyazo exclusively in the manner therein described; he is to endeavour to obtain sulpho acids of oxyazo-naphthaline by dissolving the oxyazo-naphthaline which he has already obtained, in ordinary fuming sulphuric acid containing 30 per cent. of anhydrous sulphuric acid in the proportions of ten of oxyazo-naphthaline to twenty of sulphuric acid. The mixture is then to be heated at a temperature of about 100 degrees centigrate for about two hours, or until a sample of the mixture shall be found to produce a solution with water.

"The further treatment as specified in the process is then to be pursued, that is to say: 'The further treatment consists in removing the free sulphuric acid contained in the mixture by any of the known means for effecting the purpose, such as for instance by neutralization with caustic lime, and the colouring matter may be obtained in a solid state, by preference in the state of a sodium salt, in a manner well understood by chemists.' Professor *Roscoe* is requested to state to the Court whether he obtained any and what results from the experiments so made. If he obtains no result from this experiment he is requested to repeat the experiment with fuming sulphuric acid containing 10 per cent. of anhydrous sulphuric acid, and to state what result he obtains. He is also requested to try the process exactly, acting upon the example already detailed, with sulphuric acid containing 80 per cent. of anhydrate, unless he shall consider it dangerous or impossible to follow the instructions there given, it being represented to the Court that there would be danger in following these directions implicitly. If he does not proceed with the experiment as given in the example, he is requested to state to the Court his reasons for declining to do so. If Professor *Roscoe* has any difficulty in understanding the instructions, he is requested to see the Judge personally, who will give him such instructions as are necessary. He is requested to test carefully all the materials he employs, and to see that he has no communication at all with the parties in the action or any of their agents or advisers while making the experiments; but one chemist representing either party is permitted to be present; and the costs to be costs in the cause."

After the report of Professor *Roscoe* had been made, the Court having formed an opinion upon the first branch of the case that the Plaintiffs' patent was valid, gave leave to the Defendant to describe his secret process if he should think fit to do so, in order that the Court might come to a conclusion on the second branch of the case—whether there had or had not been an infringement of the patent.

The Defendant having elected to disclose his secret process, the hearing of the evidence and arguments was continued *in camerâ* for three days, the reporters as well as the public being excluded, and the Court then reserved judgment.

PEARSON, J.

1883

BADISCHE ANILIN UND SODA FABRIK v. LEVINSTEIN.

Aston, Q.C., *Webster*, Q.C., and *Lawson*, for the Plaintiffs.

Higgins, Q.C., and *Chadwyck Healey*, for the Defendants.

The facts of the case are fully stated in the judgment.

June 27. PEARSON, J.:—

The Plaintiffs in this case, who are a general manufacturing company, are the possessors of a patent taken out on the 23rd of August, 1878, in the name of Mr. *Johnson* for "improvements in the production of colouring matters suitable for dyeing and printing." They complain that the Defendants, Mr. *Ivan Levinstein* and Messrs. *J. L. Levinstein & Sons*, the one as the manufacturer and the others as vendors, have infringed their patent by making and selling dyes which are made according to the processes described in their patent. The answer to the accusation is twofold: first, that the patent is void altogether; and secondly, that even if the patent be a good patent, Mr. *Levinstein*, the manufacturer, has invented a certain secret process substantially different from the processes described in the patent, and that he has therefore not infringed the patent. It becomes necessary to consider both those defences, and I shall take them in the order in which I have stated them.

In dealing with the defence with regard to the validity of the patent, nearly every line of which was brought into contention, I shall confine myself simply to those points which seem to be of real importance, and if I omit others it must be understood that I omit them because I do not and did not place any reliance upon them.

The patent is stated to be "for improvements in colouring matters suitable for dyeing and printing." The first lines of the specification describe it in these words: "The invention consists in the production of red and brown colouring matters which in chemical language may be termed the "sulpho acids of oxyazonaphthaline." Then it goes on to say, "and the following processes may be employed for their preparation." It then describes four processes, with which I must deal presently. What therefore I take to be the real subject of this patent is that which is

described to be "sulpho acids of oxyazo-naphthaline" and colouring matter of course; but colouring matter which, treated chemically, is sulpho acids of oxyazo-naphthaline, and I stated in the course of the argument, and I continue of that opinion, that unless the patent practically shews how the sulpho acids of oxyazo-naphthaline are to be obtained, the patent is not a good patent.

Going to the first process, it proceeds in these words: "Naphthylamine is converted into its diazo compound by the action of nitrous acid, and in a manner well known to chemists; and equal molecules of the diazo compound thus obtained, and of naphthol or naphthylic alcohol, are allowed to react upon one another, by preference in an alkaline solution. According to the employment of either of the two isomeric modifications of naphthylic alcohol, known as alpha naphthol and beta naphthol, the result of this operation is a precipitate containing either of the two corresponding and isomeric modifications of oxyazo-naphthaline, and which may be termed alpha and beta oxyazo-naphthaline respectively. These azo compounds are further converted into their sulpho acids by any method now in use for the preparation of organic-sulpho acids, such as, for instance, by heating them with fuming sulphuric acid. The excess of sulphuric acid may then be removed by any of the known means for effecting this purpose, and the colouring matter may be obtained in a solid state by precipitation or evaporation."

The first objection taken to what I have read was that naphthylamine being mentioned there, it was not stated what naphthylamine it was that was intended to be used, and there being now two naphthylamines known as alpha and beta naphthylamine, that this included beta naphthylamine, and if it included beta naphthylamine that the whole patent was bad, because either it went too far or did not describe properly how you are to treat beta naphthylamine. I came to the conclusion then, and I come to the conclusion now, that the word "naphthylamine" in the patent means that which was generally known in the year 1878 as naphthylamine, namely, what is now described as alpha naphthylamine. It appears that beta naphthylamine was discovered in 1876. In 1880 a second process for the manufacture

PEARSON, J. 1883 BADISCHE ANILIN UND SODA FABRIK v. LEVINSTEIN.

of beta naphthylamine was described in a scientific journal; but down to the year 1880 beta naphthylamine was an article only used in the laboratory, a very costly article which hardly any scientific man had seen, which was not commonly known, and although it will be found mentioned in *Fowne's* book as "beta naphthylamine," for all purposes (and I should say, certainly, for all commercial purposes) beta naphthylamine hardly existed. It has since been made much cheaper by a process which was patented in the year 1881. But although beta naphthylamine was invented in 1876, and would at once be called "beta naphthylamine" to distinguish it from the naphthylamine which had been known for at least fifteen years before, it does not follow that that naphthylamine would all of a sudden acquire the name of alpha naphthylamine; it would remain in all the books printed up to that time as naphthylamine only, and I am satisfied that at the date of the patent, and subsequently to the date of the patent, any person ordering naphthylamine simply; would have been supplied with the old naphthylamine, and nobody would have thought of asking him whether he wanted "beta naphthylamine." Under these circumstances I think it would be improper to come to the conclusion that any naphthylamine was meant in this patent except that which was known simply as "naphthylamine," that is, that which is now properly described as alpha naphthylamine.

The next objection to the terms of the patent that I have read consists in the use of fuming sulphuric acid. The principle objection to this first process has been to the use of fuming sulphuric acid. The objection will be better understood by looking to the first example which is given. There was a question raised during the course of the argument as to whether or not the example was to be taken as part of the patent. I apprehend the example shews the process by which the idea of the patentee is to be realised. A man cannot take out a patent for an idea, but he may take out a patent, if I may say so, for an idea coupled with a practical process of effecting that idea, and the example is the practical mode by which effect is to be given to the idea of this patent: the idea of producing colouring matter, by producing sulpho-acids of oxyazo-naphthaline. It therefore

becomes exceedingly important, and it was argued at considerable length before me, whether or not the process described in this first example was a process that could be practically carried through. Down to the preparation of oxyazo-naphthaline which was there described no great difficulty presented itself. But when you had got the oxyazo-naphthaline you had to sulphonate it, and the mode of sulphonating it is thus described: "In order to obtain the sulpho acids of oxyazo-naphthaline, I dissolve about ten pounds of the oxyazo-naphthaline in about twenty pounds of fuming sulphuric acid, containing about 80 per cent. of anhydrous sulphuric acid, and the mixture is heated at a temperature of about 100 degrees centigrade for about two hours, or until a sample of this mixture will be found to produce a solution with water." It was said that 80 per cent. anhydrous sulphuric acid was so strong that it was perfectly impossible to produce the sulpho acids according to this process, for before you had arrived at the sulpho acid if you used 80 per cent. anhydrous sulphuric acid, all the oxyazo-naphthaline, or the greater part of it, would be charred if not actually burnt. There was a great deal of conflicting evidence upon this subject, and the result of it was that I thought it desirable to get further evidence upon the subject from an independent scientific chemist, and both parties agreeing to Professor *Roscoe* as being one of the most competent men in *England* to assist the Court, I directed, by an order that was made, that he should pursue this first example and report to me what the result was. Accordingly he did so, and I think the Court has reason to feel considerably indebted to Professor *Roscoe* for the pains which he took in performing the experiment and giving to the Court the advice which the Court wanted. I will read simply the conclusion of the report, which is in these words: "I am of opinion that the above dyeing trials shew that the colour prepared with the acid containing 80 per cent. of anhydride is distinctly superior both in tinctorial power and in brilliancy to that prepared with the acid containing 30 per cent. of anhydride, and that this again is distinctly superior both in tinctorial power and in brilliancy to that prepared with the acid containing 10 per cent. of anhydride; and therefore I conclude from the above experiment that both as regards quantity and quality of dye

PEARSON, J. 1883 BADISCHE ANILIN UND SODA FABRIK v. LEVINSTEIN.

the process involving the use of 80 per cent. acid is superior to the others. I am also of opinion that this process can be carried out without danger, provided proper appliances are made use of." I do not forget that after that report had been received I was asked to send some further questions to the Professor in order to know exactly how those experiments had been conducted. One was as to the quantity of oxyazo-naphthaline that had been used in the sulphonating experiments, the other was as to the place and the circumstances under which the anhydrous acid had been used. To the one question he replies that rather more than a quarter of a pound had been used in each case, and in reply to the other he says, "The oxyazo-naphthaline used in each experiment was added by dusting in during the operation, and the operation was carried out on a flat leaden roof; during the operation a wind was blowing. No appreciable loss of the oxyazo-naphthaline was however incurred." It is said that inasmuch as there was a very small quantity used, and inasmuch as it was used in the open air, under those circumstances I must deduct from the conclusion of the Professor, and that I must arrive at this result: that what was done with a quarter of a pound of oxyazo-naphthaline could not be done with any large quantity of oxyazo-naphthaline; and that what was done on a flat leaden roof, exposed to the air, could not be done in a manufactory properly constructed for the purpose. I cannot arrive at either of these conclusions. I think that the result of Professor *Roscoe's* report to me is this—that for practical purposes this process can be adopted, and that the first process therefore shews the practical mode of working out that which the patentee has taken out a patent for, which was a practical mode of making sulpho acids of oxyazo-naphthaline which give a distinct colour.

The second process was rather different from the first; it is thus described: "Naphthylamine is converted into its diazo compound as before stated, and equal molecules of the diazo compound thus obtained, and of the sulpho acids of either alpha or beta naphthol are allowed to re-act upon each other, by preference in an alkaline solution. In this instance red colouring matters are the result of the operation, and may be obtained in a solid state by precipitation or evaporation. The above said sulpho acids of either alpha

or beta naphthol are produced, as is well known, by heating naphthol with excess of sulphuric acid at a temperature of about 100 degrees centigrade." The objection taken there was, that the description that you were to heat the naphthol with an excess of sulphuric acid was not a sufficient description to enable a competent chemist to conduct the process. I need say no more than this, that the use of those terms was shewn to me from Mr. *Fowne's* book and other books to be exceedingly common in chemistry and very well understood; and if I needed any further evidence of it, I have it from Mr. *Levinstein* himself, who in his description of the secret process used several times to me that very term as a term which he thought everybody knew, and which the Court, at all events, ought not to be ignorant of. Under those circumstances it is impossible for me to consider that an objection to this description. There was another objection to the second process which for some time gave me some little trouble. It was said that when you obtained from these the mixture described there, that the result of colour differed with the different bases, and that the patentee had not pointed out to you what the difference in colour was, or the strength which you ought to use in order to produce certain colours. But after looking at the evidence with some care, I come to the conclusion, first of all, that the colour really and truly is substantially the colour which the patentee produces; that it varies in shade, but simply in shade, and I cannot find in the patent that the patentee ties himself down to any particular shade; he ties himself down to two colours —red and brown; but I think the patent is intended to cover all the shades between red and brown. I admit that I should have had great difficulty in holding that that description was a good description if I had found that a colour different from either red or brown had been produced by it, but that I do not find. The next observation is this, that in considering the experiments vouched in support of the last objection, I am bound to bear in mind that the evidence given me in regard to these experiments is the evidence of gentlemen who confessedly have failed in conducting experiments with regard to the other processes where they ought to have succeeded, and that I therefore ought to place very small reliance upon it.

PEARSON, J. 1883 BADISCHE ANILIN UND SODA FABRIK v. LEVINSTEIN.

The third process is still more important than either the first or second, because when the *Blackley* red, which is the dye manufactured by Mr. *Levinstein*, was sent to three gentlemen and they were asked to analyse it, they all came to the conclusion that that *Blackley* red had been made according to this third process. The third process consists, first of all, in the manufacture of sulpho acids of naphthylamine, and after having got them, then they are mixed with the beta naphthol, and the sulphur, therefore, is to be found in the naphthylamine and not in the naphthol. In the example it says, "One part by weight of naphthylamine is mixed with about three parts by weight of fuming sulphuric acid; and the mixture is heated at a temperature of about seventy to eighty degrees centigrade, until a sample of the mixture produces a clear solution with an excess of caustic alkali." Now it was said, in the course of the argument, that the same objection which applied to the first process applied to this—that it was perfectly impossible to mix the naphthylamine in this manner with a sulphuric acid containing eighty per cent. of anhydrous sulphuric acid, and since Professor *Roscoe* has made his report it has been suggested to me that the report on the first process is by no means conclusive on the third process, because, as Mr. *Higgins* said, from the evidence, when I came to look at it, I should find that naphthylamine mixed in this way with the strong sulphuric acid was far more energetic than oxyazo-naphthaline was; that this process, therefore, was considerably more dangerous; and that I ought, if I desired to have evidence upon it, to have had the third process tried as well as the first. To my mind Professor *Roscoe's* report on the first process is perfectly sufficient, and that there is no danger in the first process, although it was argued before me with great heat, that hardly anybody could live in the place where that experiment was only partially tried, and that it would be highly dangerous to perform it in this Court. I come, therefore, to the conclusion that with ordinary care chemists properly instructed could as easily perform this third process as they could perform the first process. That was the principal objection to the third process.

Before I go further, I should like to say one word upon my obtaining the report of Professor *Roscoe*, because a hint was thrown

out, though I cannot say it was more than a hint, that there was a doubt whether I was entitled to obtain the assistance of Professor *Roscoe* in order to inform myself of the matters relative to the decision to which I ought to come in this case. I am happy to say, looking at the cases which were cited to me, that I find a distinct decision of the Court of Appeal shewing that I had power to do that which I have done, and I should be exceedingly sorry that it should go forth that the Court has not that power. In the case of *Mellin* v. *Monico* (1) the very point was raised. Lord Justice *Bramwell* says this, in giving his judgment (2), "Under sect. 56 any question arising in the cause may be referred by the Court or Judge for inquiry and report to an official or special referee. He is not to dispose of the action, and I do not think he is even to determine any matter in issue between the parties; if there are facts disputed—for instance, if one of the parties asserts that a building is twenty feet high, and the other that it is twenty-five feet—the referee in such a case as that must determine the fact and report it; his duty is, instead of determining issues of fact or of law, to find the materials upon which the Court is to act." I think that is exactly what Professor *Roscoe* has done in this case, and I think I was entitled, whether the parties liked it or not (and they did not assent or dissent from it), in this case, to send the questions to Professor *Roscoe*, which I did, not to decide any issue in the case, but to get from him that information which would enable me to decide what is before me. I have said that there is really nothing more in the third process, which was seriously objected to, but I do not forget that there came in there a very important passage, which will have considerable bearing on the second question in this action. After describing the mode of producing the sulpho acids of naphthylamine, he says, "By the said methods, as is well known, several modifications of the sulpho acids of naphthylamine are obtained, chiefly differing from each other by their various degrees of solubility in water, some of them being nearly insoluble, such as the so-called naphthionic acid." At the conclusion of the example to which I am referring, these words are used, "All these modifications of the sulpho acids of naphthylamine may be converted into the

(1) 3 C. P. D. 142. (2) 3 C. P. D. 149.

PEARSON, J. 1883 BADISCHE ANILIN UND SODA FABRIK v. LEVINSTEIN.

corresponding sulpho acids of oxyazo-naphthaline in the manner above described, and thus colours obtained, differing in a similar ratio, in their various degrees of solubility." There is also the fourth process, which I do not refer to because both sides agree that the fourth process must stand or fall by the other processes.

Then there comes the claim at the end. He claims "The production of red and brown colouring matters, which in chemical language may be termed the sulpho acids of oxyazo-naphthaline, by the action of the diazo compounds which may be prepared from naphthylamine or from the sulpho acids of naphthylamine upon any of the isomeric naphthols or of mixtures of the same, or upon any of the sulpho acids which may be prepared from either alpha naphthol or from beta naphthol, or from mixtures of the same, substantially by the processes above described." It was said amongst other things that the claim altogether is too wide—that he claims not only all acids then known, but all acids which might be hereafter discovered. I am of opinion that any patentee who takes out a patent for a chemical invention claims that which is known and which has been discovered at that time, and that he cannot claim that which afterwards becomes a new discovery; and that, with regard to the terms of his patent, the law will restrain him if he uses language to meet that which is outside the subject-matter of his patent, and the law will hold that the patent is for that which was known at the time, and not for that which was discovered ten or fifteen years afterwards. I hold therefore that the claim is not too wide.

I think that reading the patent fairly, both the examples which are given, and the processes which are shewn—that they are processes in which the combination is a combination of the sulpho acids in solution, treating them with a caustic alkaline solution. But the idea that is claimed, the idea which the patentee has discovered, if I may use that expression for want of a better one, is the discovery of a certain substance which is properly chemically described as a sulpho acid of oxyazo-naphthaline, and with respect to which in order that he might take out a patent he was bound to shew a practical mode of making it. That he has done. Having shewn a practical mode of making it, he was not bound to shew every mode by which it could be made. I am of

opinion, therefore, that as he mentions that there are acids more or less soluble which will be produced in the process of making, he is not excluded by the terms of his patent from saying: Although I have described a process by which some of these acids can be made, I do not mean to say that I reject all those which are less soluble, and I have pointed out that they are less soluble; but by substantially the same process that you can make the former by, you can produce sulpho acids of oxyazo-naphthaline from the latter, and therefore I consider those as included in my patent. I come to the conclusion therefore that the patent is valid, I think there is no real objection to it. I think the idea was a new one. I think that the process is sufficient in order to protect it. I think that it is workable. I think it results not simply in that which will produce a laboratory experiment, but in that which may be used for commercial purposes. Under those circumstances I must decide the first issue in favour of the Plaintiffs.

I come now to that which to anyone like myself unacquainted with chemistry must necessarily be a matter of greater difficulty, and that is the question of infringement. Before proceeding to that, however, I should like to state the course that I have pursued, because the circumstances that have arisen in this case are circumstances that, as far as I know, and as far as counsel know, never arose in any other case before; and it may be useful if the plan which I have adopted is the right and proper plan, that parties should know hereafter what plan it was that I did proceed upon. Mr. *Levinstein*, who has defended this case with very great fairness as well as with very great ability, set up by his defence that he had a secret process. Of course the question as to whether or not that secret process is a process which is within the terms of the patent is what I shall have to consider. But it was plain to me that if he were called upon to state in open Court what that secret process was, it might turn out eventually, if I should come to the conclusion that the patent was bad, and if I called upon him then to state to the public a secret which he ought to be at liberty to confine within his own breast, that I might do him irreparable mischief. Accordingly I allowed him not to answer certain questions which were

PEARSON, J. 1883 BADISCHE ANILIN UND SODA FABRIK v. LEVINSTEIN.

put to him, leaving him to determine for himself before the case was finally closed whether he would or not communicate his secret process to the Court, so that the Court might be able to determine whether he had infringed the patent. I thought it right under these circumstances to continue the case with regard to the validity of the patent until I had got so far as that the balance in my own mind was in favour of the patent, and until I found that unless on further consideration I changed my then opinion, I should decide that the patent was valid. I then required Mr. *Levinstein's* counsel to elect whether he would communicate his secret process, or whether he would not. Mr. *Higgins* elected to communicate the secret process, and I then heard Mr. *Levinstein's* description of that secret process with closed doors, no persons being present except the parties and their scientific assistants. Now in treating this question of infringement I shall be very careful to say nothing with regard to it that I think can communicate to the outside public the secret which Mr. *Levinstein* has. I think that is only fair to him, and I think I am bound as far as I possibly can to protect him from any injury in consequence of any statement he has made to the Court.

There are two principles which, as deciding this question of infringement, I have to bear in mind; one is this, that in these chemical cases where a patentee has made some discovery in chemistry, any person may afterwards use for the same purpose chemical equivalents which were not known to be chemical equivalents at the time the patent was taken out. That is so expressed in the judgment of Mr. Justice *Williams* in the case of *Unwin* v. *Heath*, in which he says (1), "There is ample evidence that to melt together oxide of manganese and carbonaceous matter, with steel and iron, will serve as an equivalent for the melting together of carburet of manganese with steel or iron in producing the desired result. But there is no evidence that at the time of the patent and specification this was known to persons of ordinary skill in chemistry. And I fully agree with the doctrine which has been repeatedly laid down in the course of the discussion of this cause, that though the use of a chemical

(1) 2 Web. Pat. Cas. 302.

or mechanical substitute which is a known equivalent to the thing pointed out by the specification and claimed as the invention, amounts to an infringement of the patent; yet if the equivalent were not known to be so at the time of the patent and specification, the use of it is no infringement." And Mr. Baron *Parke* (1) says this, "The specification must be read as persons acquainted with the subject would read it at the time it was made, and if it could be construed as containing any chemical equivalents it must be such as are known to such persons at that time; but those which are not known at the time as equivalents, and afterwards are found to answer the same purpose, are not included in the specification. They are new inventions." That is one principle which I have to bear in mind in looking at this case.

But there is another principle no less important than that, and that is this, that where a patent is taken out for a process for arriving at a known result (I mean a result known before the patent is taken out for the process *simpliciter*), any other person may take out a patent for another process, or may use another process without taking out a patent, without any infringement of the process first taken out. But when a patent is taken out for a new result not known before, and there is one process described in the patent which is effectual for the purpose of arriving at that new result at the time when the patent is taken out, the patentee is entitled to protection against all other processes for the same result, and no person can, without infringing upon his patent, adopt simply a different process for arriving at the same result. That is stated in a great number of cases and in great detail. The first case to which I refer is the case of *Jupe* v. *Pratt*, and I am reading from p. 146 of the first volume of *Webster's* Patent Cases, in which Baron *Alderson* quotes the argument of the Lord Chief Baron *Pollock*, and is referring to a case which the Chief Baron had argued, and he says this: "The difficulty which will press on you" (Baron *Alderson* was then addressing the jury), "and to which your attention will be called in the present case, is this: you cannot take a patent for a principle; you may take out a patent for a principle coupled with the mode

(1) 2 Web. Pat. Cas. 314.

PEARSON, J. 1883 BADISCHE ANILIN UND SODA FABRIK v. LEVINSTEIN.

of carrying the principle into effect provided you have not only discovered the principle, but invented some mode of carrying it into effect. But then you must start with having invented some mode of carrying the principle into effect; if you have done that, then you are entitled to protect yourself from all other modes of carrying the same principle into effect, that being treated by the jury as a piracy of your original invention."

The same doctrine will be found laid down in the case of *Household Coal and Iron Company* v. *Neilson* (1), in which Lord Justice Clerk *Hope* (and this is a case which was carried to the House of Lords) lays it down in this way: "I state to you the law to be, that you may obtain a patent for a mode of carrying a principle into effect; and if you suggest and discover, not only the principle, but suggest and invent how it may be applied to a practical result by mechanical contrivance and apparatus, and shew that you are aware that no particular sort or modification, or form of the apparatus, is essential, in order to obtain benefit from the principle, then you may take your patent for the mode of carrying it into effect, and are not under the necessity of describing and confining yourself to one form of apparatus. If that were necessary, you see what would be the result. Why, that a patent could hardly ever be obtained for any mode of carrying a newly discovered principle into practical results, though the most valuable of all discoveries. For the best form and shape or modification of apparatus cannot in matters of such vast range and requiring observations on such a great scale be attained at once; and so the thing would become known, and so the right lost, long before all the various kinds of apparatus could be tried. Hence you may generally claim the mode of carrying the principle into effect by mechanical contrivance, so that any sort of apparatus, applied in the way stated, will more or less produce the benefit, and you are not tied down to any form."

And in a later case before Lord *Westbury*, Lord *Westbury*, with his usual terseness, states the matter in a manner still more pointed. I am referring now to the case of *Curtis* v. *Platt*. I am reading it from Mr. *Goodeve's* book at page 102. He says "It is extremely desirable that when a beneficial idea has been started

(1) 1 Web. Pat. Cas. 685.

by one man, he should have the benefit of his invention, and that it should not be curtailed or destroyed by another man simply improving upon that idea; but if the idea be nothing in the world more than the discovery of a road to attain a particular end, it does not at all interfere with another man discovering another road to attain that end, any more than it would be reasonable to say that if one man has a road to go to *Brighton* by *Croydon* another man shall not have a road to go to *Brighton* by *Dorking*."

Now, bearing these cases in mind, I really have to consider whether Mr. *Levinstein's* secret process comes under the first principle—a new discovery of a chemical equivalent, or whether it comes under the second principle—whether it is simply a discovery of a new process, if it be a discovery at all, to produce the same result which is patented by the patent. There is no dispute whatever between the parties, that, so far as regards the materials which are described, substantially Mr. *Levinstein* uses the same materials. In his very first process, in which he wants to obtain the sulpho acids of naphthylamine, he does not use fuming sulphuric acid; but though he does not use fuming sulphuric acid, he uses what I consider to be a known chemical equivalent to it in that which he mixes with the naphthylamine, and his process results in the production of naphthionic acid in the form of crystals. I have no hesitation in saying that, so far as I am capable of judging, the process he has used is a process which is much cheaper, much simpler, and which produces less waste, and results in giving you naphthionic acid in a much purer form than it would do according to the process mentioned in the patent. It is said that that is entirely a new discovery of Mr. *Levinstein's*. I have said already, and I repeat, that I cannot entertain a doubt in my own mind, although I am very diffident of expressing any opinion on a chemical matter, that, judging as well as I can from the information before me, I do not entertain a doubt that naphthionic acid is produced by a chemical operation equivalent, and known to be equivalent at the time the patent was taken out. Having obtained this, he then proceeds to produce the diazo compound. Now there is some difference between the witnesses as to whether or not there was any method known of treating

PEARSON,J. 1883 BADISCHE ANILIN UND SODA FABRIK v. LEVINSTEIN.

naphthionic acid so as to produce this diazo compound except *Clevè's* method. So far as I am capable of judging, I incline to the opinion that *Clevè's* method was the only one that was known. I say so, not forgetting that Dr. *Griess* said in his further examination on the eighth day, that somewhere in 1860 he had invented the process known as "Dr. *Griess's* method for making diazo compounds," and that it was applicable to every case. I am still inclined to think, notwithstanding that, that Dr. *Griess's* method had probably not been applied to naphthionic acid; and, in speaking of ordinary skilled chemists employed in manufactories of this kind, the only method known to them would be *Clevè's* method. At all events I can do Mr. *Levinstein* no injustice by assuming that *Clevè's* method was the only method then known. In this case also Mr. *Levinstein*, by experiment, has found out a cheaper method, and I suppose a better method, than that of *Clevè's*, for producing this diazo compound; and I will even assume for a moment in favour of Mr. *Levinstein* that he might be able, if a patent could be taken out for such a matter, to take out a patent for what he has done. But at the same time my own impression is this, that in what he has done he has simply by experiment, and pursuing courses well known in chemistry, adapted to this particular naphthionic acid process processes which have been used for other subject-matters, although it had not been found, possibly because it was not wanted, that they were capable of being used with regard to naphthionic acid. He has then got his diazo compound. He admits that he uses beta naphthol, and he only uses beta naphthol in one very well-known chemical shape instead of another.

Now comes what again was relied upon very strongly. Having got his diazo compound of naphthylamine, and having got his beta naphthol, both in solid forms, he has to combine them. He does not use caustic soda, he uses another vehicle, and he says that there is a very great difference in using that other vehicle from using the caustic alkaline solution which is mentioned in the patent; and one of the differences he says is this, that whereas the caustic alkaline solution spoils his colour, the vehicle that he uses keeps it perfectly good, and in fact improves it. But, nevertheless, he uses that vehicle in order to combine the diazo compound

which he has got of the sulpho acid of naphthylamine with the beta naphthol, and, unless I am much mistaken, speaking from his own evidence, the difference in the use of the two vehicles is this, that whereas the caustic soda would dissolve the beta naphthol, the vehicle which Mr. *Levinstein* uses affects the diazo compound of naphthylamine. I purposely use the word "affects," because Mr. *Levinstein* told us it was almost impossible to say what was the exact effect which the vehicle he used had on the diazo compound. Whether it be solution or whether it be decomposition, before the one or the other has taken place entirely, at the very first outset, when the effect begins to be produced in the *status nascens*, as Mr. *Levinstein* said, the result is that the diazo compound combines with the beta naphthol, and you then get the colouring matter that you want. It is afterwards precipitated in one way or another, pressed, dried, filtered, and reduced to powder.

Then the result at which I arrive is this: the processes employed by Mr. *Levinstein* are processes deserving of great praise; but they are simply processes which produce exactly the same results from the same materials which are produced by this patent. The same object is pursued, the same materials are employed, the same result is attained. I cannot do otherwise than come to the conclusion that those are merely processes, that they are not a new invention differing from the patent, but are in reality the manufacture of the sulpho acids of oxyazonaphthylamine by a process differing in some respects from the process employed according to the patent.

I cannot come to this conclusion, I must honestly say, without some regret. I think Mr. *Levinstein* has employed great knowledge, great skill, and great perseverance in finding out these processes, but I am sorry to say that the law compels me to inform him that these processes cannot be used in the production of this colouring matter, seeing that the production of this colouring matter is protected by a patent.

I must, therefore, decide the second issue also in favour of the Plaintiffs.

There must be an order for an injunction. There must be, if necessary, inquiries as to damages. The Defendant, *Levinstein*,

PEARSON,J. 1883 BADISCHE ANILIN UND SODA FABRIK v. LEVINSTEIN.

must pay the costs of the action, and considering the nature of the case, and the defence that it was a secret process, which I have heard in secret, and the publication of which I intend to restrict as far as I possibly can, I must order, and I do order, that the shorthand notes of the 13th, 14th, 15th, and 16th days, and all the printed copies in the possession of the Plaintiffs, or their agents, be sealed up and impounded in Court until either there shall be an appeal, in which case the parties are at liberty to apply for the delivery out of Court of so many copies as they want, or until, either by lapse of time or otherwise, it shall be determined that there is to be no appeal, in which case any application may be made to the Court for the disposal of them as the parties may think fit.

Webster, Q.C., then asked for a certificate that the validity of the patent had been in question, and for a certificate that the Plaintiffs had proved the breaches. And he further asked that there should be an account of profits instead of damages; and that the dye stuffs, if any, verified by affidavit, should be, at the option of the Defendant, either delivered up to the Plaintiffs or destroyed. In support of the latter proposal the case of *Plimpton* v. *Malcolmson* (1) was cited as an authority.

PEARSON, J., acceded to these proposals, and directed that the shorthand notes should be impounded for a period of one month; but the injunction would not be suspended during the time. And His Lordship also directed that the costs occasioned by the employment of Professor *Roscoe*, should be costs in the cause.

Solicitors: *J. H. Johnson; Gregory, Rowcliffes, & Co.*

(1) Law Rep. 20 Eq. 37.

T. W. G.

Ex parte LIMEHOUSE BOARD OF WORKS. *In re* VALLANCE.

PEARSON, J.

1883

June 2, 29; *July* 2.

Payment of Money out of Court—Petitioner entitled under Will—New Zealand Probate—English Probate necessary.

A petitioner asked for payment out of Court of money to which he was entitled under an appointment by will:—

Held, that probate of the will in the Supreme Court of *New Zealand* was not sufficient for this Court to act upon, but the will must be proved in *England*.

THIS was a petition by *James Charles Vallance* for the payment out of Court of a sum of £1065 which had been paid in by the *Limehouse* Board of Works as purchase-money for a leasehold house and premises in *Wapping*, being a public-house called "*The Black Boy*." In the year 1838 *Thomas Vallance*, in whom the property had become vested, by his will bequeathed the same to trustees upon trust to take the rents and profits and pay the same to his son *Charles Augustus Vallance* during his life, and after his decease to stand possessed thereof upon further trust for such of his child or children to whom he should by his will bequeath the same. *Thomas Vallance* died in May, 1838. The money was paid into Court in the year 1874 to the credit of the trustees of the will of *Thomas Vallance*, and the interest thereof was ordered to be paid to them upon the trusts of the will. *Charles Augustus Vallance* received the interest up till July, 1882, and died in the following September in *New Zealand*. *Charles Augustus Vallance* by his will devised and bequeathed to his son, the Petitioner, *James Charles Vallance*, all his interest in the leasehold property now in question to which he was entitled under his father's will. The will was proved in the Supreme Court of *New Zealand* (*Wellington* District) on the 29th of September, 1882, by the executors named therein. The Petitioner submitted that he was absolutely entitled to the aforesaid sum now in Court, and being resident in *New Zealand* he had executed a power of attorney enabling *Edward R. Keele* to take such proceedings as should be necessary for the payment of the money, and to receive the same on his behalf.

PEARSON, J.

1883

Ex parte LIMEHOUSE BOARD OF WORKS. *In re* VALLANCE.

Druce, in support of the petition:—

The only question which arises on this petition is whether probate of the will in the Supreme Court of *New Zealand* is sufficient evidence to satisfy this Court. In the case of *Waite* v. *Bingley* (1) letters testimonial of the Supreme Court of the colony of *Victoria*, Probate jurisdiction, setting out the will, were accepted as sufficient proof of a will made in *Victoria* of real estate in *England*, for the purpose of the usual preliminary judgment in a partition action. The appointee of a power takes by force of the act of the donor and not of the donee of the power: *Tatnall* v. *Hankey* (2). In *D'Huart* v. *Harkness* (3) a sum of money was given to such persons as the Baroness should by her last will, duly executed, appoint. And it was there held to mean a will so executed as to be good according to English law. In this case the will has been admitted to probate in *New Zealand*, which is conclusive that it is well executed according to English law. In *In re Daly's Settlement* (4) it was decided that a will which was valid according to foreign law but invalid according to English law was not a due execution of the power. In that case the will was signed but not attested. There is a recent case of *In re Tootal's Trusts* (5), where the will was made in *China* and proved at *Shanghai*. There it was assumed that the Court could look at the Chinese probate.

PEARSON, J.:—

It is true that the power is simply to be executed by will, but the Court of Chancery does not know what a will is except by probate of the Ecclesiastical Court. Otherwise I do not know whether it is a will or not. However I will look at the case of *In re Tootal's Trusts* before I decide finally.

July 2. PEARSON, J.:—

I reserved my final decision in this case in order that I might consider the effect of the decision of Mr. Justice *Chitty* in *In re*

(1) 21 Ch. D. 674.
(2) 2 Moo. P. C. 342.
(3) 34 Beav. 324.
(4) 25 Beav. 456.
(5) 23 Ch. D. 532.

Tootal's Trusts (1), and I need hardly say that if I had found in his judgment any indication of an opinion contrary to that which I have already expressed, or even a doubt expressed by him, I should have given it the gravest consideration. But so far from finding any expression or indication of opinion contrary to the conclusion I have already expressed, I find that Mr. Justice *Chitty* gave an opinion quite in accordance with it. In *In re Tootal's Trusts* it was not disputed that the will did not require an English probate, and his Lordship there said, "The Supreme Court (that is of *Shanghai*) is a Court of Law and Equity, and a Court for Matrimonial Causes, but without jurisdiction as to dissolution or nullity or jactitation of marriage. It is a Court of Probate, and as such, 'as far as circumstances admit,' has for and within *China*, with respect to the property of British subjects having at the time of death 'their fixed places of abode in *China*,' all such jurisdiction as for the time being belongs to the Court of Probate in *England*." Under those circumstances, Mr. Justice *Chitty* accepted the *Shanghai* probate as sufficient. Those circumstances, however, do not exist in the case of the Probate Court of *New Zealand*, and therefore I think that an English probate is necessary. The Petitioner must pay the costs of obtaining the probate, as they are part of the costs of making out his own title.

Solicitor: *E. R. Keele.*

(1) 23 Ch. D. 536.

T. W. G.

PEARSON, J.

1883

June 11, 13, 18, 19.

SAYERS *v.* COLLYER.

[1882 S. 1004.]

Building Estate—Mutual Restrictive Covenants—Alteration of Character of Property—Breach of Covenant—Injunction.

A building estate was laid out in lots, which were sold by the owners of the estate to different purchasers, each of whom covenanted with the vendors, and with the owners of the other lots entitled to the benefit of the covenant, not to build a shop on his land, or to use his house as a shop, or to carry on any trade therein. The purchaser of one of the lots, who occupied his house as a private residence, brought an action against the purchaser of another lot, who was using his house as a beershop with an "off" license, to restrain him from breaking his covenant, and for damages. The Defendant had to the knowledge of the Plaintiff so used his house for three years before the action was commenced. There was evidence that several other houses built on others of the lots (one of them immediately opposite the Plaintiff's house), had been for some time used as shops, notwithstanding the covenant, and that many of the houses adjoining the Plaintiff's house were occupied, not each by a single tenant, but each by two families at weekly rents:—

Held, that the character of the property had become so changed that the original purpose—the keeping the estate as a residential property—for which the covenant had been entered into, had failed, and that it would under the circumstances be inequitable to enforce the specific performance of the covenant.

The principle of *Duke of Bedford* v. *Trustees of the British Museum* (1) applied.

And, the Plaintiff not having proved any substantial damage, the action was dismissed with costs.

THE *British Land Company* purchased an estate at *Leytonstone*, which they laid out in lots for building purposes, and sold the lots to different purchasers.

By a deed, dated the 28th of March, 1877, the company conveyed one of the lots, No. 440 in a plan therein referred to, to *George Upton* in fee. The deed contained a recital that the property was sold to the purchaser subject to the stipulations specified in the 2nd schedule to the deed, which referred to the plan. And the deed contained the following covenants: "Now therefore the vendors (as to so much of the land to which the said stipulations relate as remains vested in them) for themselves and their

(1) 2 My. & K. 552.

assigns, and the purchaser (as to the land hereby conveyed) for himself, his heirs, executors, administrators, and assigns, do respectively covenant and grant with and to each other, and as to the purchaser also with and to the owners or owner of any other land to which the benefit of the said stipulations is attached, and their, his, or her respective heirs and assigns, that the covenantors respectively, and their respective heirs and assigns, will henceforth observe, perform, and comply with the said stipulations so far as the same relate either to the rights or to the duties of the purchaser, his heirs or assigns, in respect of the land hereby conveyed, and that nothing shall ever be erected, fixed, placed, or done upon the land as to which they respectively covenant in breach or violation of or contrary to the fair meaning of the said stipulations."

The 2nd schedule to the deed was entitled, "Stipulations relating to lots 424 to 445 inclusive," and it contained (*inter alia*) the following stipulations: "Trades, &c., prohibited.—No building shall be erected or used as a shop, workshop, warehouse, or factory, nor shall any trade or manufacture be carried on, nor any operative machinery be fixed or placed, nor any noxious or offensive process or deposit be carried on or made upon any lot."

"Mutual covenants.—Each conveyance shall contain covenants by the vendors and the purchaser to observe the above stipulations. The covenant of the purchaser (in respect of the land conveyed) shall be with the vendors and the other owners of the land to which the stipulations relate, and also, as to lots 435 to 445, with the owners of lots 283 to 288, and 308 to 312 on the plan."

The lots 424 to 445 fronted upon a road called *Lansdowne Road*, which formed their southern boundary. Houses were afterwards built on these lots, and were called *Somerset Terrace*. The lots 283 to 288 and 308 to 312 were opposite to *Somerset Terrace*, being on the opposite side of *Lansdowne Road*, which formed their northern boundary. Houses were afterwards built on these lots; most of these houses being called *Elizabeth Terrace*. Some of them, however, fronted on another road, called *Cecil Road*, which ran at right angles to *Elizabeth Terrace*, and in a southerly direction.

PEARSON, J. 1883 SAYERS v. COLLYER.

By a deed, dated the 28th of September, 1877, *Upton* conveyed No. 21, *Somerset Terrace* (which was a part of lot 440), to the Plaintiff in fee, subject to the restrictive covenants contained in the deed of the 28th of March, 1877. The Plaintiff occupied the house as his private residence.

By a deed, dated the 17th of April, 1878, the company conveyed lot 445 to *Leonard Prevost* in fee, subject to covenants and stipulations corresponding to those contained in the deed of the 28th of March, 1877.

In April, 1879, the Defendant agreed to purchase from *Prevost* lot 445, upon which a house built to all appearance as a public-house or beershop had then been erected. Before the property was conveyed to him the Defendant had notice of the restrictive covenants, but it was conveyed to him by a deed dated the 18th of April, 1879, without any restriction whatever. In May, 1879, the Defendant obtained an off-license for the sale of beer, and he then opened the shop as a beershop, and continued to use it as such, obtaining a renewal of his license from year to year.

On the 2nd of March, 1882, the Plaintiff issued the writ in this action, claiming an injunction to restrain the Defendant from so using the house, and from carrying on any other trade therein contrary to the covenants entered into by *Prevost* in the deed of the 17th of April, 1878. The Plaintiff also claimed damages.

The evidence shewed that the Plaintiff became aware of the use of the Defendant's house as a beershop immediately after the Defendant so opened it, and that he had in 1879 told the Defendant's manager that the Defendant had no right so to use it, but the Plaintiff took no steps to prevent the Defendant from so doing until he commenced this action. The Plaintiff himself had for some time bought beer at the Defendant's shop. The Plaintiff said that the reason why he did not take proceedings against the Defendant sooner was that he had mortgaged his own house, and the title deeds were in the possession of the mortgagee, and he did not know that he had any right to enforce the restrictive covenant until after he had in 1881 paid off the mortgagee and had consulted his solicitor. When he had done this the present action was commenced. There was evidence that in one of the houses in *Elizabeth Terrace*, nearly opposite to the

Plaintiff's house, the business of a greengrocer had been carried on for about three years before the commencement of the action and was still being carried on at the time of the trial; that in two other houses on the same plot business had been carried on, though this had been discontinued before the commencement of the action. In the one case the business of a bootmaker had been carried on; in the other that of a dressmaker; in each case by means of cards placed in the window of the house, the house not being altered into a shop. The dressmaker's business was carried on for eighteen months. In several others of the houses in the same block trades had been carried on, in one case for three years. There was also evidence that at the time of the trial most of the houses in *Somerset Terrace* were occupied, not each by a single tenant, but each by two families, occupying portions of the house as separate tenements at weekly rents, the rents paid amounting in the whole for each house to 8*s.* or 10*s.* per week.

Everitt, Q.C., and *E. Ford*, for the Plaintiff:—

The Plaintiff has a legal right to sue on the restrictive covenants entered into by *Prevost*, though he did not execute the deed of the 17th of April, 1878: 8 & 9 Vict. c. 106, s. 5; *Werdermann* v. *Société Générale d'Électricité* (1). The Defendant purchased with actual notice of the covenant: *Western* v. *MacDermott* (2). The defence is that other owners of houses on the estate have committed similar breaches of covenant, and that the Plaintiff has acquiesced. The Court can only look at the particular block in which the Plaintiff's house is situate, the covenants being limited to that block. The non-interference by the Plaintiff with small breaches of the covenant by other persons will not deprive him of his right against the Defendant: *Western* v. *MacDermott*. A man does not lose his right by mere inactivity, unless the *Statute of Limitations* applies: *Fullwood* v. *Fullwood* (3). Unless he has led the other party to expend money mere passive acquiescence will not deprive him of his rights: *London, Chatham, and Dover Railway Company* v. *Bull* (4). There has been no such general alteration in the character of the particular block of the estate

(1) 19 Ch. D. 246.
(2) Law Rep. 2 Ch. 72.
(3) 9 Ch. D. 176.
(4) 47 L. T. (N.S.) 413.

PEARSON, J. 1883 SAYERS v. COLLYER.

as in the *Duke of Bedford* v. *Trustees of the British Museum* (1). For the same reason *Peek* v. *Matthews* (2); *Roper* v. *Williams* (3) do not apply. There has been no waiver of the Plaintiff's right to enforce the covenant: *German* v. *Chapman* (4). There has been no substantial change in the character of the estate.

[The following cases were also referred to: *Evans* v. *Davis* (5); *Master of Clare Hall* v. *Harding* (6); *Lee* v. *Haley* (7).]

Cozens-Hardy, Q.C., and *Farwell*, for the Defendant:—

The Plaintiff has acquiesced in a number of breaches of the covenant, and he cannot now enforce it against the Defendant. When the Defendant bought his house it was constructed for use as a shop, and for that reason he gave a higher price for it. No doubt a man is entitled to relief by injunction on the footing of his legal right, unless there are special circumstances which disentitle him to it: *Imperial Gas Light and Coke Company* v. *Broadbent* (8). But in the present case there are such special circumstances. The Court has a discretion as to the specific performance of a covenant. In *Barret* v. *Blagrave* (9) an injunction to restrain a breach of covenant was refused on the ground of acquiescence. It is true the acquiescence there was for eleven years, but that is only a question of degree. In *Eastwood* v. *Lever* (10) acquiescence was held to be a good defence to a suit to enforce a covenant of this nature. In *Peek* v. *Matthews* the plaintiff denied knowledge of the alleged breaches of covenant by other persons, but still the injunction was refused. If a plaintiff allows covenants to be violated in this way the Court will not at his instance restrain a breach of them by a particular individual. In determining whether to grant or to refuse an injunction, the Court will have regard to the comparative inconvenience to the parties: *National Provincial Plate Glass Insurance Company* v. *Prudential Assurance Company* (11). The Defendant finds other houses on the estate being used as shops, and buys his house,

(1) 2 My. & K. 552.
(2) Law Rep. 3 Eq. 515.
(3) T. & R. 18.
(4) 7 Ch. D. 271.
(5) 10 Ch. D. 747.
(6) 6 Hare, 273.
(7) Law Rep. 5 Ch. 155.
(8) 7 H. L. C. 600.
(9) 6 Ves. 104.
(10) 4 D. J. & S. 114.
(11) 6 Ch. D. 757.

which is constructed as a shop, on that footing. The Plaintiff sees the house built as a shop and used as such, and does nothing to stop it for three years. It would be a great injury to the Defendant to prevent him from using the house as a shop, whereas the damage caused to the Plaintiff by its use in that way is trivial. The principle of *Roper* v. *Williams* (1) and *Duke of Bedford* v. *Trustees of the British Museum* (2) applies. "If a party, having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word acquiescence": *Duke of Leeds* v. *Earl Amherst* (3). That exactly applies to the present case.

Everitt, in reply:—

The Plaintiff did not know his rights till he consulted his solicitor in 1881. *Barret* v. *Blagrave* (4) is distinguishable. In that case there was a collateral agreement, such as in *Erskine* v. *Adeane* (5). *Eastwood* v. *Lever* (6) was very different from the present case. The covenant there was only to build in a particular way. If the relief which the present Plaintiff asks is refused he will be absolutely precluded from preserving this block of houses as a residential property, which was the object of the covenant. Mere delay is not acquiescence; the Plaintiff has not induced the Defendant to lay out money in building or otherwise. The nature of the Defendant's business must be considered; he has only an annual license to sell beer for consumption off his premises. In *Gaskin* v. *Balls* (7) the Court refused to order a building to be pulled down which had been erected in breach of a covenant, but had been allowed by the plaintiff to remain for five years without complaint. *German* v. *Chapman* (8) and *London, Chatham, and Dover Railway Company* v. *Bull* (9) are direct authorities in the Plaintiff's favour. The Defendant had distinct notice of the covenant. It is a positive stipulation not

(1) T. & R. 18.
(2) 2 My. & K. 552.
(3) 2 Ph. 117, 123.
(4) 6 Ves. 104.
(5) Law Rep. 8 Ch. 756.
(6) 4 D. J. & S. 114.
(7) 13 Ch. D. 324.
(8) 7 Ch. D. 271.
(9) 47 L. T. (N.S.) 413.

PEARSON, J. 1883 SAYERS v. COLLYER.

to use the houses as shops. There is no waiver by allowing other houses to be so used: *Kemp* v. *Sober* (1).

[PEARSON, J.:—That was the case of a simple covenant between lessor and lessee as to the use of one house; not a covenant entered into with reference to other houses.]

The general character of the estate has not been substantially altered here; the houses have not been converted into shops; it is only that things have been sold in some of them. The houses still retain the character of private dwelling-houses. *National Provincial Plate Glass Insurance Company* v. *Prudential Assurance Company* (2) does not apply. It was a case of nuisance, not of contract. In a case of contract it is immaterial whether the amount of damage is trivial: *Attorney-General* v. *Mid-Kent Railway Company* (3); *Lord Manners* v. *Johnson* (4). The difference between the legal and the equitable effect of covenants affecting land is illustrated by *Tulk* v. *Moxhay* (5); *Earl of Zetland* v. *Hislop* (6).

[PEARSON, J.:—Under *Lord Cairns' Act* the Court has power to give damages in substitution for an injunction. Ought I to grant an injunction if I should be of opinion that the Plaintiff has suffered one farthing damages?]

It is a question of general right, and the effect of refusing the injunction would be to destroy the Plaintiff's right altogether.

PEARSON, J. (after stating the facts), continued:—

I am not going to decide this case upon the question of acquiescence. I am not going to decide that the Plaintiff has acquiesced so long in the carrying on of the beershop by the Defendant, that the Defendant has acquired a right to carry it on. The question which I think I ought to consider is this, whether, having regard to the present state of the property, the Court ought now to interfere in order to prevent the Defendant's breach of the restrictive covenant.

When Mr. *Cozens-Hardy* opened his case he proposed to shew

(1) 1 Sim. (N.S.) 517.
(2) 6 Ch. D. 757.
(3) Law Rep. 3 Ch. 100.
(4) 1 Ch. D. 673.
(5) 2 Ph. 774.
(6) 7 App. Cas. 427.

1883

SAYERS v. COLLYER.

that the covenants with regard to the adjoining lots of the estate had been so completely given up, that all the adjoining property had become so altered in its character, that it would be unfair now to compel the specific performance of the covenants with regard to this particular plot. I then stated that in my opinion (and I still retain that opinion) I can look only at the covenants affecting this particular block. Considering the manner in which the property was laid out, and the manner in which the stipulations are confined to each particular block, the covenants in the conveyances of the lots in each particular block being expressly confined to that particular block, and no mention being made of any covenants relating to any other block, I think I am bound to treat this block as if it was a solitary block, and to consider only the effect of the covenants with regard to it. That which must be the basis of my judgment is the consideration whether, having regard to the nature and object of the covenants, the Court ought in the present state of things to interfere to restrain a breach of them.

Now the *British Museum Case* (1) appears to me to furnish the principle on which I ought to proceed. In that case the Duke of *Bedford*, being the owner of all the property in the neighbourhood of the *British Museum*, for the protection of a large part of that property known as *Southampton House*, took a covenant from the persons to whom he sold or let other parts of the property restricting them from building upon them otherwise than in a particular way. But he afterwards himself built upon a large part of the property which was originally intended not to be built upon, and, having so built, he came to this Court to restrain persons who wanted to build contrary to their covenant upon an adjoining part of the property. The Court said, You have so altered the property since you originally compelled these persons to enter into the covenant, you have so completely changed the face of it by building houses which strictly speaking were against the covenant, which the other persons to whom you had granted building leases might have restrained you from erecting, that it would be inequitable now to give you the benefit of a covenant which you yourself have treated as absolutely void. The Court therefore refused the injunction.

(1) 2 My. & K. 552.

PEARSON, J. 1883 SAYERS v. COLLYER.

Now I have to consider whether the present case is not one in which, to use Lord *Eldon's* words, it would be oppressive now to give effect to this covenant. I can see that the stipulations entered into here were intended for the purpose of keeping this property (to use Mr. *Everitt's* word, which I think is a very proper one) as a residential property, to keep it as private house property in the ordinary sense of the word, and to prevent shops being built on it. As I understand the word, and as I understand the stipulations, the intention was that these houses should be occupied in the ordinary way in which houses are occupied by separate owners, so as to keep each house a private house for a private family. I find, on the contrary, that, after the few years which have elapsed since the buildings were begun, the houses are no longer let to private persons, each occupying one house, but that the majority of the houses in *Somerset Terrace* are divided between two families at rents of 10*s.* or 8*s.* a week, each family paying one moiety of that very small sum. I find that during the same period of time shops have been opened immediately opposite the Plaintiff's house. I find that he himself allowed the Defendant's shop to be opened, and allowed it to continue for three years before he thought of bringing this action. I come therefore to the conclusion that the action is not brought *bonâ fide* for the purpose of stopping the use of the Defendant's house as a beershop, because it is really no injury either to the Plaintiff or to the persons living in his immediate neighbourhood in the same block, but that there is some other reason which I do not know which has induced the Plaintiff in the year 1882 to complain of that of which he did not complain for three years before. I ask, therefore, as I think I am bound to do, Is there really any injury whatever shewn to the Plaintiff? Does the covenant exist now for the purposes for which it was originally entered into? Shall I be doing justice or injustice if I grant the injunction asked for? Shall I be enforcing the covenant in order to keep the property in the state in which it was intended to be kept when these stipulations were first made, or shall I be only stopping the use of one house as a shop with no chance whatever (except by a series of actions which may succeed or which may fail) of restoring the property to that which it was originally intended to be—a

residential property? I come to the conclusion that I must answer all these questions in the negative; I must say that the contract can no longer be performed for the purposes for which it was entered into, and that under these circumstances I ought not to grant the injunction.

Then, under that very useful Act which is known as *Lord Cairns' Act*, I have a right in any case where I refuse an injunction to grant damages instead. No damages whatever have been proved to have been occasioned to the Plaintiff by the opening of the Defendant's shop. I cannot see that it has either produced or is likely to produce any damage to the Plaintiff's property. It is not a public-house in the ordinary sense of the word, in which case there might be a complaint that the house was so conducted, and attracted so many persons to it, that it was more or less a nuisance to the Plaintiff. It is a house for the sale of beer under an off-license only. I have not heard any evidence, and I do not suppose that any evidence can be produced, to shew that it is in any way a nuisance to the Plaintiff, and his own conduct for nine months shews, not only that it was not a nuisance, but that it was beneficial to him, for during that period he supplied himself with beer from the Defendant's shop.

I come, therefore, to the conclusion that I cannot give the Plaintiff one farthing damages for what has been done, and I dismiss his action with costs.

Solicitors for Plaintiff: *Clapham & Fitch.*
Solicitors for Defendant: *Stokes, Saunders, & Stokes.*

W. L. C.

PEARSON, J.

DAVIES TO JONES AND EVANS.

1883
June 20.

Vendor and Purchaser Act, 1874—*Legal Estate in Executors—Interest commensurate with Objects of Will.*

A testator, after directing his debts to be paid, and setting apart certain sums to provide annuities for his two sons, devised and bequeathed all his real and personal estate to his wife and his four daughters, to be equally divided between them: Provided as follows—that the share of his wife should be divided after her death between his four daughters or the survivors and their children; and the testator appointed his wife and *T. Davies*, his executors, to act jointly in carrying out all the intentions of his will, and to invest his daughters' shares for their benefit and the benefit of their children:—

Held, upon an application under the *Vendor and Purchaser Act*, that the legal estate in the freeholds was vested in the executors who could make a good title to a purchaser.

A QUESTION was raised in this case upon an adjourned summons under the *Vendor and Purchaser Act*, 1874, for the decision of the Court.

Watkin Anwyl, by his will dated in February, 1876, directed his funeral, testamentary, and other debts, to be discharged by his executors, and after a specific bequest, the testator continued: "I direct as follows—in the case of my son *Evan Jones*, I give and bequeath unto him a life interest in £3000 invested, or to be invested, by my hereinafter-mentioned executors, at not less, if possible, than £4 per cent. per annum, or higher; the interest to be paid to my son *Evan Jones*, half yearly, by arrangement by my executors according to their discretion. After the term of his natural life, I give and bequeath the said sum of £3000 to my four daughters hereinafter mentioned, to be distributed amongst them, share and share alike, or amongst their children if they should not be then surviving. I further bequeath to my son *Evan Jones*, the house and garden in the town of *Dolgelly* for ever. I give, devise, and bequeath to my son *William*, a life interest in the sum of £3000 already invested, or to be invested, by my hereinafter-mentioned executors at £4 per cent. per annum or higher, the said interest to be paid to him half-yearly. If my said son *William* dies without any legal issue, I direct my herein-

after-mentioned executors to divide equally the said £3000 amongst my four hereinafter-mentioned daughters, or if not surviving, their children. But if my said son *William* leaves a wife and children legally entitled to his estate, I direct that £1000 shall be invested for the benefit of such wife or children, according to the discretion of my hereinafter-mentioned executors, and at the age of twenty-one years I give and bequeath to each and every child their respective share or shares for ever. I give, devise, and bequeath all my real and personal estate of every kind, and all moneys invested on mortgages, shares in public companies, or otherwise, to my wife *Mary Anwyl*, and my four daughters *Mary Evans*, *Anne Jane Davies*, *Jane Evans*, and *Harriet Sophia Jones*, in manner and form following:—After the discharge of all just debts, the investment of £6000 for the benefit of my two sons, also two sums of £50 each, which I hereby bequeath to my executors, I ordain that the residue of all my personal and real estate shall be equally divided between my said wife and my said four daughters. Provided as follows: my said wife, *Mary Anwyl*, shall enjoy her share during the term of her natural life, and I direct my surviving executor, his heirs, assigns, or executors, to distribute the said share after the decease of my said wife among my said four daughters, share and share alike (or if any one or the whole of the said daughters should not survive my said wife, the share of each deceased daughter shall be equally distributed among the children or grandchildren of such). I appoint my wife *Mary Anwyl*, and my son-in-law the Rev. *T. Davies*, M.A., to be my executors to act jointly in carrying out all the intentions of this my last will and testament. I ordain my said executors to invest the share of my daughter *Mary* for her benefit and the benefit of her children, and at her death I bequeath the said share to her children or grandchildren; in equal shares to the children or the proportionate shares to the grandchildren, if the parents shall then be dead. The mortgage on *Yotroslwynd* (£2242 3*s.* 10*d.*), if not paid up before, shall be included in the said share. I ordain my executors to deal in like manner with the share of my daughter *Jane*, the sum of £1000 lent on bond, if not paid to form part of the same. I also direct my executors to pay the interest of £1000 invested, as per deed of

PEARSON, J. settlement, to Mrs. *Evan Jones Anwyl;* the shares of my daughters *Anne* and *Harriet* I bequeath absolutely to them."

1883

DAVIES TO JONES AND EVANS.

The testator died in 1876. *Mary Anwyl* (the executrix) died in June, 1876. The estate was not fully administered, and the sale of portions of the real property was necessary to enable the estate to be divided amongst the parties entitled, which could only be done when the sale of the property and the calling in of some outstanding mortgages was completed.

In the year 1877 *Thomas Davies* contracted to sell to *David Jones* and *John Jones Evans* a portion of the real estate of the testator situate at *Dyffryn*, in *Merionethshire*, but the purchasers objected to complete on the ground that according to the proper construction of the will *Thomas Davies* could not sell the real estate of the testator and make a good title thereto, and receive the purchase-money thereof, and give a good discharge for the same, and pass the legal estate to a purchaser, because the testator having by his will charged his real estate with the payment of debts and legacies, and devised the estate so charged for the whole of his estate or interest therein to his wife and four daughters upon certain trusts, the effect was that the survivors of those five persons, together with the husbands of such of them, if any, as were married women, were the proper persons to effect a sale as devisees in trust under the 14th section of the Act 22 & 23 Vict. c. 35.

Lewin, for the vendor:—

The only question is in whom the legal estate is vested. It is submitted that the intention of the testator is to be collected from the whole will, and that you cannot give effect to that intention without holding that the executors have the legal estate vested in them. The first case that shews this principle is *Bush* v. *Allen* (1). There the testator gave the rents, issues, and profits of certain lands to his wife to be paid to her by his executors, and it was held that the executors took the lands in trust to receive the rents and profits to the use of the wife. In *Doe* v. *Woodhouse* (2) there was a devise of real and personal estate to the testator's wife for life, and after her death part of

(1) 5 Mod. 63.

(2) 4 T. R. 89.

the property was to be sold by the executors and the proceeds to be divided between five persons. The testator then gave two annuities, to be paid by his executors out of his whole estate, and he devised the remainder of the profits after his wife's death to three persons equally. It was there held that the executors took the fee simple; so in *Anthony* v. *Rees* (1) it was held in very similar circumstances that the legal estate vested in the trustees. *Oates* v. *Cook* (2), *Trent* v. *Trent* (3), *Doe* v. *Pratt* (4), *Doe* v. *Gillard* (5), and *Trent* v. *Hanning* (6), are all cases decided upon the principle that where there is a duty thrown upon the executors which requires the fee to be in them to carry it out, then the fee does vest in them.

Loughborough, for the purchasers:—

My clients are willing purchasers, and all they want is a good title. They say it is not necessary for the executors to have the fee in order to carry out the intention of this testator. It is not necessary for them to sell the estate in order to pay and divide the property. There is in this will an express devise to the wife and daughters, and there is nothing from which you can imply that the executors are to have the legal estate. It is not necessary for them to have the legal estate in order to carry out the testator's intention.

PEARSON, J.:—

The foundation of the rule applicable to this case is to be found in *Oates* v. *Cook*, in which Lord *Mansfield* said (7), "The intention is to be collected from all the parts of the will, and it must be clear, or else the heir-at-law shall not be disinherited; but here the testator's intention is most clear that he meant to devise his real estate in trust." And in *Anthony* v. *Rees* (8), in which *Oates* v. *Cook* is cited, Baron *Bayley* made use of these words, "It is clear that we are bound to look at all the parts of the will to see

(1) 2 Cr. & J. 75.
(2) Burr. 1684.
(3) 1 Dow, 102.
(4) 6 Ad. & E. 180.
(5) 5 B. & Ald. 785.
(6) 7 East, 97.
(7) Burr. 1686.
(8) 2 Cr. & J. 83.

PEARSON, J. 1883 DAVIES TO JONES AND EVANS.

whether a provision which may at first appear absolute be not qualified by some subsequent clause," and he added, "When trustees are directed to do anything for the performance of which the legal estate is requisite they are to have the legal estate." Now the rule is, and always has been, that you must find out the intention of the testator from the whole will taken together and decide according to that; and though there may be words capable of a different meaning, still if it appears on the whole construction that you cannot give effect to the will unless you give the executors a legal estate, then you must hold that they have the legal estate. Now the testator in this case begins by directing payment of his debts, &c., and after giving various legacies and directing the mode in which they are to be paid, continues, "I give, devise, and bequeath all my real and personal estate of every kind, and all moneys invested on mortgages, shares in public companies, or otherwise, to my wife *Mary Anwyl* and my four daughters," naming them. If the will had stopped there that would have been an absolute devise to the wife and four daughters, but the will goes on—"Provided as follows: my said wife, *Mary Anwyl*, shall enjoy her share during the term of her natural life," and after her decease the share of his wife is to be distributed by his surviving executor among his four daughters, share and share alike, and if any of his daughters should not survive his wife the shares of such deceased daughters are to be divided between the survivors or their children. There is nothing in that clause to shew by whom the division is to be made, but it goes on: "I appoint my wife and my son-in-law, the Rev. *T. Davies*, to be my executors, to act jointly in carrying out all the intentions of my will," and he also directs the shares of his daughters to be invested for their benefit and the benefit of their children. Now, in my opinion, there were two things required, one was that the executors were to carry out all the intentions of the testator, and another was that they were to distribute the residue of the estate among the wife and daughters in the manner pointed out; consequently the wife and daughters take nothing absolutely, and the only way in which I can give effect to the whole of the will is by saying that the executors must in the first

place raise so much money as may be necessary for paying the testator's debts and funeral expenses, and after that they are to provide for the legacies, and then to have in their own hands whatever remains and to divide that between the wife and children in the manner directed by the will.

I must therefore hold that they had the legal estate for the purpose of the will, and my opinion is that they can make a good title to the purchaser.

As to costs I shall give no costs on either side.

Solicitors: *J. Jodan; Saffery & Huntley.*

T. W. G.

In re STONOR'S TRUSTS.

Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *ss.* 5, 19—*Settlement—Future acquired Property—Property to separate use excepted—Settlement not affected by Act.*

A marriage settlement made in 1862 contained an agreement for the settlement of any future acquired property of the wife to a specified amount (except interests settled and limited to her separate use). The wife after the commencement of the *Married Women's Property Act*, 1882, became entitled absolutely to a bequest above the specified amount, without any limitation as to separate use:—

Held, that by the 19th section of the above Act the marriage settlement was exempted from the 5th and other sections; and that the bequest to the wife came within the covenant to settle future acquired property and must be dealt with as if the Act had never been passed.

BY a settlement made on the marriage of *Charles Welman* and *Eugenia* his wife, dated the 25th of November, 1862, several sums of stock, amounting to upwards of £12,000, were directed to be held by the trustees upon trust out of the income to raise the annual sum of £200 and pay the same by quarterly payments every year to the wife for her sole and separate use without power of anticipation, and subject thereto to pay the interest, dividends, and annual produce of the said trust funds to the husband and his assigns, and after the decease of either of them to the survivor for life, and after the death of the survivor to hold the said trust funds for the benefit of the children of the mar-

PEARSON, J. 1883 *In re* STONOR'S TRUSTS.

riage, with subsequent limitations, but it was thereby agreed and declared that when and so soon as the trustees should by the conversion into money of the several sums of stock thereby settled have received a sum or sums amounting in the aggregate to the sum of £12,000 sterling, the trustees should thenceforth stand possessed of the residue or balance above that sum of the moneys arising from the conversion of the stocks upon trust for such persons as the wife should by writing under her hand or by her will appoint, and in default of and subject to any such appointment upon trust to convert the residue of any such stocks, and pay the proceeds thereof and the balance of all moneys arising from such conversions, freed from the trusts of the settlement, to the wife for her sole and separate use, and it was thereby also agreed and declared that in case any sums of money or securities for money to the amount of £500 or upwards at any one time (other than and except interests which should be restricted for the life of the wife, or whether so restricted or not, should be settled and limited to her separate use and disposal), should at any time or times during the joint lives of the said husband and wife, by gift, devise, bequest, or otherwise, devolve upon the wife or the husband in her right, then and in every such case the same should be forthwith conveyed, transferred, assured, and paid to the trustees for the time being upon the trusts thereinbefore declared concerning the trust moneys, stocks, funds, and securities thereinbefore settled.

In the year 1863 the stocks comprised in the settlement were sold for a sum exceeding £12,000 sterling, and the balance above that sum was paid to Mr. *Welman* on the written direction of his wife.

By the will of *Sophia Stonor*, the mother of Mrs. *Welman*, dated the 3rd of March, 1860, the testatrix, after giving certain specific and pecuniary legacies, gave and bequeathed the residue and remainder of her personal property and effects unto her daughter *Eugenia Welman*, her executors, administrators, and assigns. The testatrix died on the 14th of January, 1883, and after her debts and legacies had been paid the residuary personal property amounted to £979 5*s.* 0*d.*

A question thereupon arose whether, having regard to the provisions of the before-mentioned settlement, the said sum of £979 5*s.* was payable to *Eugenia Welman* upon her separate receipt, or to the trustees of the settlement, and the money having been paid into Court, a petition was presented by Mrs *Welman* and her husband asking that the money might be paid out to her on her separate receipt, or that the rights of the parties might be ascertained and declared.

Cozens-Hardy, Q.C., and *Morshead*, in support of the petition:—

We submit that the fund in Court, which was bequeathed to Mrs. *Welman* by the will of her mother, ought not to be paid to the trustees of the settlement, but to the Petitioner upon her separate receipt. The bequest under the will is to Mrs. *Welman* absolutely without any restriction, and this consequently comes under the 5th section of the *Married Women's Property Act*, 1882, which provides that every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of as her separate property all real and personal property her title to which shall accrue after the commencement of the Act. The joint operation of the will and the Act is in effect to limit the fund to the separate use and disposal of Mrs. *Welman* within the meaning of the provision in the settlement. The language of the provision is general, and extends, with the specified exceptions, to any money or securities for money which shall at any time during the joint lives, by gift, devise, bequest, or otherwise, devolve upon or vest in the wife. These words include a gift to the wife by will, which is converted into a gift to her separate use by Act of Parliament. The scope and object of the settlement was to protect the moneys coming to the wife from her husband's creditors, and not to increase the provision for the children, which was in fact fixed at £12,000 by the clause to which effect has already been given, providing for the payment to the wife of any surplus beyond that sum. The fund is, in fact, by the will of the testatrix and the law in force at her death, given to Mrs. *Welman* for her separate use, and is consequently excluded from the operation of the settlement; but

PEARSON, J. 1883 *In re* STONOR'S TRUSTS.

even if it were subject to the settlement, then we contend that it must be held upon the trusts declared concerning the trust moneys, stocks, funds, and securities thereby settled, which trusts were in effect, as regards £12,000 sterling and the investments representing the same, for the benefit of the husband and wife and their children; but as to the surplus for the benefit of Mrs. *Welman* for her separate use. It follows, therefore, that whether the fund in Court is subject to the settlement or not, Mrs. *Welman* is now entitled to it on her separate receipt.

Rashleigh, and *Ward*, for the Respondents.

PEARSON, J.:—

Notwithstanding the ingenious arguments which have been addressed to me in support of Mrs. *Welman's* claim I must come to the conclusion that this money is subject to the trusts of the settlement. It is urged that any property settled to the separate use of Mrs. *Welman* is not included in the agreement to settle future acquired property. This property is given to the wife by her mother's will absolutely, without any restriction as to separate use, but then by the *Married Women's Property Act*, which gives to a married woman certain new rights, it is provided by the 5th section that she shall be entitled to hold as her separate property all personal property her title to which shall accrue after the commencement of the Act. It is contended that this property accrued to her after the commencement of this Act, and that she is entitled to it as her separate property, and that therefore it comes within the exception. Now if there had been no marriage settlement then the wife would have taken this money for her separate use under the 5th section. But by the 19th section of the Act it is provided that "nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made whether before or after marriage respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached, or to be hereafter attached, to the enjoyment of any property or income by a woman under any

settlement, agreement for a settlement, will, or other instrument." I must therefore omit sect. 5 of the Act in construing the proper bearing of this instrument, and I am thrown back upon the settlement, and I must hold that this money is not within the exception, and the money must be paid to the trustees and must be held by them upon the trusts of the settlement, for I consider that the provision as to the surplus over and above £12,000 is applicable to the stocks specifically settled, and not to any moneys subsequently coming into settlement under the agreement to settle after-acquired property.

The costs of all parties must be paid out of the fund.

Solicitors: *Tylee, Wickham, Moberly, & Tylee*; *Ward, Mills, Witham, & Lambert.*

T. W. G.

In re ADAMS AND THE KENSINGTON VESTRY.

[1883. A. 625.]

Lease—Option to purchase Fee Simple—Nature of Interest conferred on Lessee—Real and Personal Representatives—Will—Construction—Precatory Trust.

A lease of land contained a covenant by the lessor with the lessee, his executors, administrators, and assigns, that if the lessee, his executors, administrators, or assigns, should at any time thereafter be desirous of purchasing the fee simple of the demised land, and should give notice in writing to the lessor, his heirs and assigns, then the lessor, his heirs or assigns, would accept £1200 for the purchase of the fee simple, and on receipt thereof would convey the fee simple to the lessee, his heirs or assigns, or as he or they should direct. The lessee died intestate, and nearly twenty years after his death, his heir, who was also administrator of his personal estate, called on the devisee of the lessor to convey the fee simple to him in accordance with the covenant, and a conveyance was executed accordingly. The heir afterwards contracted to sell part of the property thus conveyed to him.

Held, that the option to purchase was attached to the lease and passed with it; that it consequently passed as part of the lessee's personal estate to the administrator, and that the administrator could not make a good title to the purchaser, unless the next-of-kin of the lessee would concur in the sale.

A testator gave and devised all his real and personal estate unto and to the absolute use of his wife, her heirs, executors, administrators, and assigns, "in full confidence that she will do what is right as to the disposal

PEARSON, J.

1883

In re ADAMS AND THE KENSINGTON VESTRY.

thereof, between my children, either in her lifetime or by will after her decease."

Held, that under these words the widow took an absolute interest in the property unfettered by any trust in favour of the children.

Lambe v. *Eames* (1), *In re Hutchinson and Tenant* (2), *Curnick* v. *Tucker* (3), and *Le Marchant* v. *Le Marchant* (4), commented on.

ADJOURNED SUMMONS.

This was a summons under the *Vendor and Purchaser Act*, 1874.

On the 25th of November, 1882, an agreement was entered into between *Charles Adams* and the Vestry of the parish of *St. Mary Abbotts, Kensington*, for the sale by *Adams* to the vestry of a piece of land situate at *Notting Hill*, for which the vestry had given a notice to treat under the powers conferred on them by the Act 57 Geo. 3, c. xxix., for an estate of inheritance in fee simple in possession.

The abstract of the vendor's title to the property commenced with a lease, dated the 30th of September, 1819, by which *John Smith* demised some property at *Notting Hill* (which included the property agreed to be sold by *Charles Adams* to the vestry), to *Ralph Adams* for the term of sixty years from the 24th of June, 1819, at the annual rent of £60. The lease contained a covenant by *Smith*, for himself, his heirs, executors, and administrators, with *Ralph Adams*, his executors, administrators, and assigns, "that if the said *Ralph Adams*, his executors, administrators, or assigns, shall at any time or times hereafter be minded or desirous of purchasing the fee simple and inheritance of the said piece or parcel of land and premises hereby demised, and of such desire shall give notice in writing to the said *John Smith*, his heirs or assigns, then he the said *John Smith*, his heirs or assigns, shall and will within one calendar month next after the receipt of such notice, at his own expense make out a title to the said piece or parcel of land and premises, and also accept and take the sum of £1200 in full for the purchase of the said fee simple and inheritance, and on receipt thereof shall and will, at the costs and charges of the said *Ralph Adams*, his executors or

(1) Law Rep. 6 Ch. 597.
(2) 8 Ch. D. 540.
(3) Law Rep. 17 Eq. 320.
(4) Ibid. 18 Eq. 414.

administrators, convey the said fee simple and inheritance free from incumbrances to the said *Ralph Adams*, his heirs and assigns, or as he or they shall direct or appoint."

Ralph Adams died intestate on the 14th of January, 1858, leaving *Ralph Adams*, the younger, his eldest son, *Charles Adams* (the vendor), his second son, and nine other children and his widow him surviving. *Ralph Adams*, the younger, died in March, 1866, intestate, and without having been married, leaving his brother *Charles Adams* his heir-at-law and also heir-at-law to *Ralph Adams*, the father. Letters of administration to the estate and effects of *Ralph Adams*, the father, were on the 17th of August, 1876, granted to *Charles Adams*.

The reversion in fee in the property comprised in the lease of the 30th of September, 1819, became vested, subject to that lease, in one *George Smith*, and was at the time of his death vested in him. He died on the 20th of February, 1861, having on the same day executed a will in the following terms: "I give, devise, and bequeath all my real and personal estate and effects whatsoever and wheresoever unto and to the absolute use of my wife *Harriet Smith*, her heirs, executors, administrators and assigns, in full confidence that she will do what is right as to the disposal thereof between my children, either in her lifetime, or by will after her decease." And the testator appointed his sons, *G. H. Smith* and *S. S. Smith*, his executors. They proved his will on the 4th of April, 1861. The testator left his widow and some other children him surviving. In 1877, *Charles Adams* gave notice to *Harriet Smith*, the widow of *George Smith*, of his desire to exercise the option of purchasing the property comprised in the lease of the 30th of September, 1819, in accordance with the covenant therein contained, and on the 6th of July, 1877, *Harriet Smith* executed a deed by which, in consideration of £1200 paid to her by *Charles Adams*, she purported to grant the property comprised in the lease to *Charles Adams* in fee, subject to but with the benefit of the lease. The deed contained a recital of the notice by *Charles Adams* of his desire to purchase the property, and that *Harriet Smith* had agreed to perform the covenant, and to convey the property to him in fee. The £1200 was paid by *Charles Adams* out of his own moneys.

PEARSON, J. 1883 *In re* ADAMS AND THE KENSINGTON VESTRY.

The vestry took two objections to the title thus shewn by *Charles Adams*. 1. That the next-of-kin of *Ralph Adams* the father, or their representatives, were the persons entitled to the benefit of the option to purchase, and that a good title to the property could not be made without the concurrence of those persons in the conveyance. 2. That under the will of *George Smith*, his widow did not take an absolute interest in the property devised and bequeathed to her, but that she took it subject to a precatory trust for the benefit of the children of *George Smith*, and that the concurrence of those children in the conveyance to the vestry must be obtained.

The vendor refused to comply with the requisitions, and the present summons was then taken out by the vestry, asking a declaration that *Charles Adams* could not make a good title to the property comprised in the agreement without the concurrence of the other persons interested in the personal estate of *Ralph Adams* (the father), and without the concurrence also of the children of *George Smith*, or their representatives.

Smart, for the Vestry:—

The option to purchase was void because it might be exercised at any time within sixty years from the date of the lease. This was a violation of the rule against perpetuities: *London and South Western Railway Company* v. *Gomm* (1). But this is immaterial, for *Charles Adams* availed himself of his position and took the benefit of the covenant, and he cannot now be heard to say that the transaction was void. He is in the same position as if the covenant had been valid, and that being so, it is clear that the option went with the lease and formed part of the personal estate of *Ralph Adams*. His executor or administrator was after his death the person entitled to exercise the option, and for the benefit of the persons interested in the personal estate of *Ralph Adams*. The purchase-money would certainly be personal estate of the vendor: *Lawes* v. *Bennett* (2); *Townley* v. *Bedwell* (3); *Collingwood* v. *Row* (4). That is to say, the property was as regards the lessor converted into personalty in case the

(1) 20 Ch. D. 562.
(2) 1 Cox, 167.
(3) 14 Ves. 591.
(4) 26 L. J. (Ch.) 649.

option should be exercised, and it was equally personal estate as regarded the lessee. In *Edwards* v. *West* (1), *Fry*, J., declined to extend *Lawes* v. *Bennett* (2), but the authority of that case is untouched. The covenant gives the option to the executors, administrators, or assigns of *Ralph Adams*, and the benefit of it goes with the lease: *Jarman's Bythewood's* Conveyancing (3). The covenant is to convey to *Ralph Adams*, his heirs and assigns, but those are merely words of limitation, and mean only that the conveyance is to be in fee. The next of kin of *Ralph Adams* are entitled to the benefit of the option, and *Charles Adams* cannot make a good title without their concurrence.

The other point is that the effect of the will of *George Smith* was to create a precatory trust for the benefit of his children, not to give his wife an absolute interest in his property, and therefore she could not make a good title without the concurrence of the children; she took no more than a life interest: *Lambe* v. *Eames* (4); *In re Hutchinson and Tenant* (5); *Wace* v. *Mallard* (6); *Gully* v. *Cregoe* (7); *Shovelton* v. *Shovelton* (8); *Curnick* v. *Tucker* (9); *Le Marchant* v. *Le Marchant* (10).

F. Pownall, for the vendor:—

The effect of the covenant was to give to *Ralph Adams* an equitable interest in fee in real estate independent of the leasehold interest, and, on his death intestate, the leasehold interest went to his next of kin, but the other interest descended to his heir-at-law.

The heir is entitled to the benefit of the covenant: *Sheppard's* Touchstone (11). Such a covenant as this cannot be attached to a lease so as to run with it.

[PEARSON, J.:—It would come to an end with the lease?]

Not necessarily; not unless it was so expressed. But the covenant is void, and then *Charles Adams*, to whom a conveyance in fee has been made, can make a good title. At any rate, the

(1) 7 Ch. D. 858.
(2) 1 Cox, 167.
(3) 3rd Ed. vol. iv. p. 637, n.
(4) Law Rep. 6 Ch. 597.
(5) 8 Ch. D. 540.
(6) 21 L. J. (Ch.) 355.
(7) 24 Beav. 185.
(8) 32 Beav. 143.
(9) Law Rep. 17 Eq. 320.
(10) Ibid. 18 Eq. 414.
(11) 7th Ed. vol. i. p. 175.

PEARSON, J. 1883 *In re* ADAMS AND THE KENSINGTON VESTRY.

effect of the covenant was to create an immediate interest in the land in *Ralph Adams: London and South Western Railway Company* v. *Gomm* (1); and that interest went on his death to his heir. "If a contract for the purchase of real estate gave the purchaser a mere option which he had not declared at the time of his death," the real representative of the purchaser has no claim on his personal estate for the purchase-money, "but, upon principle, it would seem, that if he chose to pay for the estate out of his own pocket, he might enforce the contract against the vendor, unless the clause of option were so worded as to be confined to the purchaser individually": *Dart's* Vendors and Purchasers (2); *Green* v. *Smith* (3). That the option is collateral to the lease is shewn by *Buckland* v. *Papillon* (4); *Green* v. *Low* (5). In *Davidson's* Conveyancing (6), the form of a covenant by a lessor giving the lessee an option of purchasing the fee, is to convey "to such person or persons, as the lessee, her executors, administrators, or assigns, shall direct."

As to the effect of *George Smith's* will, an absolute interest is expressly given to the wife, and the natural construction of the subsequent words is "that they express the testator's belief or wish without imposing a trust:" *Jarman* on Wills (7); *Irvine* v. *Sullivan* (8). *Lambe* v. *Eames* (9) was approved in *Mussoorie Bank* v. *Raynor* (10), and it is clear that the doctrine of precatory trusts will not now be extended.

Smart, in reply:—

The option was intended to be exercised during the occupation of the lessee, it was not to exist for all time: *Buckland* v. *Papillon*. The covenant gave a right to call for a conveyance of the fee, and, if *Ralph Adams* had declared his option during his life, he would have acquired an equitable interest in the land which would have passed to his heir, but, as he did not, the benefit of the option went to the persons who were entitled to the leasehold interest. In *London and South Western Railway Company* v.

(1) 20 Ch. D. 562, 580–582.
(2) 5th Ed. vol. i. p. 266.
(3) 1 Atk. 572.
(4) Law Rep. 2 Ch. 67.
(5) 22 Beav. 625.
(6) 2nd Ed. vol. v. p. 143.
(7) 4th Ed. vol. i. p. 388.
(8) Law Rep. 8 Eq. 673, 680.
(9) Ibid. 6 Ch. 597.
(10) 7 App. Cas. 321.

2 Jur N S 848

Gomm (1) there was no relation of landlord and tenant as in the present case. The covenant is in effect a covenant to convey the fee to *Ralph Adams*, if he during his life shall comply with the conditions, and in the same way to convey the fee after his death to any person filling the character of executor or administrator to *Ralph Adams* and complying with the conditions. If *Ralph Adams* had assigned the lease, he might perhaps have reserved to himself the option, if he had done so by express words, but an assignment of the benefit of the lease would have carried with it the option of purchase. The option would have passed by a bequest of the lease.

As to the precatory trust, *Irvine* v. *Sullivan* (2) is really a decision in my favour. The decision was that the legatee took the property beneficially, subject to the performance of the testator's wishes communicated to her. The point was not really decided in *Lambe* v. *Eames* (3); the true ground of the decision was that the trust had been fulfilled. *Palmer* v. *Simmonds* (4) is distinguishable. In the present case the trust would have been performed if the wife had disposed of the property among the children by her will. She would not be excluded altogether.

July 7. PEARSON, J. (after stating the facts), continued:—

Charles Adams says that, having purchased the fee simple of the demised property with his own money, he is entitled to it absolutely for his own use, and can, therefore, by himself make a good title as vendor to the vestry.

The vestry have taken two objections. They say, in the first place, "Although you could and did require Mrs. *Smith* to fulfil the covenant contained in the lease, and Mrs. *Smith* did thereupon convey to you the fee simple of the property, you nevertheless took the lease, and the fee simple when conveyed to you, as part of the personal estate of your father; you cannot hold it for your own use, and you cannot therefore make a good title to it without the concurrence of those persons who are entitled to share with you under the intestacy of your father." The vestry make this further objection to the title, that Mrs. *Smith* under

(1) 20 Ch. D. 562.
(2) Law Rep. 8 Eq. 673.
(3) Law Rep. 6 Ch. 597.
(4) 2 Drew. 221.

PEARSON, J. 1883 *In re* ADAMS AND THE KENSINGTON VESTRY.

the terms of her husband's will did not take an absolute interest in the property, but took an interest saddled with a trust, and that she therefore had not an absolute right to dispose of this property. I will deal with the first objection first. It arises under the lease. The lease is an ordinary lease for sixty years, with this covenant superadded. I shall not inquire whether the covenant was good or bad; I shall assume for the purpose of what I am going to say that it was invalid. But I do so without expressing any opinion at all upon the question of its validity. To my mind it is immaterial in the circumstances of the case whether it was valid or invalid, because at all events Mrs. Smith has treated it as valid, and the fee simple has been conveyed to *Charles Adams*, and no one disputes that legally the fee simple is vested in him, or that he obtained the conveyance as administrator of *Ralph Adams*.

The case was very well argued by Mr. *Pownall*, and he put it in this way. He said, it is perfectly true that the lease regarded as a chattel was part of the personal estate of *Ralph Adams*, and was, therefore, on his death intestate divisible amongst all his children, but the covenant in question was a separate thing altogether. The covenant giving the option to purchase created an equitable interest in real estate, which was vested in *Ralph Adams* as a separate interest from the leasehold interest. It therefore descended to his eldest son as his heir at law, and on the death of the eldest son it descended from him to the second son, who was therefore entitled to it absolutely for his own use. I cannot accede to that view. I think the option to purchase was an integral part of the lease and went with the lease. If the lease had been simply assigned, without any more words, the option would have passed with it, and, as on the death of *Ralph Adams* the lease passed to his administrator, the administrator took the lease, together with the right to enforce the option of purchase if he should think it beneficial. *Charles Adams*, being administrator, has taken the benefit of the covenant and has enforced it, and I am of opinion that he cannot now hold the property for his own benefit, excluding his brothers and sisters from any interest in it.

I hold, therefore, that the first objection is well founded, and

that, in order to make a good title to the vestry, the concurrence of the other persons interested under the intestacy of *Ralph Adams* is necessary.

The other question depends upon the terms of the will of *George Smith*. [His Lordship read the will.] The argument on the part of the vestry is that that created a trust for the children. On the other side it is said that it gave Mrs. *Smith* an absolute interest, and that there was no trust superimposed. It is, of course, impossible to shut one's eyes to the fact that there is some conflict between the modern authorities on the subject and the older ones, and that the question arises, which authorities, in a case of this kind, ought to be followed? I have no hesitation in saying that, if the older authorities stood alone, there would be the strongest ground for saying that the words created a trust, and that Mrs. *Smith* did not take for her own absolute use. But I also entirely agree with what Lord Justice *James* said in *Lambe* v. *Eames* (1), that when you come to read the older authorities you cannot but arrive at the conclusion that they created trusts in numbers of cases where trusts were never intended, and I am very glad to shelter myself under the decision in *Lambe* v. *Eames* and to be freed from the necessity of declaring that there was a trust in the present case. In *Lambe* v. *Eames* "a testator gave his estate to his widow to be at her disposal in any way she may think best, for the benefit of herself and family," and certainly the Court of Appeal (then constituted of Lord Justice *James* and Lord Justice *Mellish*) were disposed (I need not put it higher than this) to come to the conclusion, and they would, I think, have come to the conclusion if they had been driven to it, that no trust was created.

But Mr. *Smart* was perfectly justified in saying that there was a second point in that case upon which the decision may be said to have rested as much as upon the first, viz., that assuming there was a trust, the trust had been complied with. Nevertheless, in *In re Hutchinson and Tenant* (2) *Jessel*, M.R., said (3), "In *Lambe* v. *Eames* the testator gave his estate to his widow 'to be at her disposal in any way she may think best for the benefit of

(1) Law Rep. 6 Ch. 597.
(2) 8 Ch. D. 540.
(3) 8 Ch. D. 542.

PEARSON, J. herself and family;' and the Court of Appeal held, affirming the decision of Vice-Chancellor *Malins*, that the widow took absolutely." Certainly the opinion of the Master of the Rolls was that such was the decision of the Court of Appeal, and I think, if the Court of Appeal had been obliged to decide the case simply upon the question whether the widow took absolutely, they would have decided that she did.

1883

In re ADAMS AND THE KENSINGTON VESTRY.

There have been two other cases since *Lambe* v. *Eames* (1), in both of which, I must say, the words were more like those in the present case than the words in *Lambe* v. *Eames* were. In *Curnick* v. *Tucker* (2) before Vice-Chancellor *Hall*, the testator appointed his wife sole executrix, "to whom I leave all my property, landed, personal, and of every description whatsoever and wheresoever, for her sole use and benefit, in the full confidence that she will so dispose of it amongst all our children, both during her lifetime and at her decease, doing equal justice to each and all of them." There the Vice-Chancellor held that the wife took a life interest, with a power of disposition amongst her children in her lifetime, or by deed or will, as she might think fit. And in *Le Marchant* v. *Le Marchant* (3), before Vice-Chancellor *Malins*, the will was in these words: "I bequeath to my wife all property whatsoever that I may die possessed of, for her sole use and benefit, in the full confidence that she will so bestow it, on her decease, to my children in a just, true, and equitable spirit, and in such manner and way as she feels would meet with my full approval." Vice-Chancellor *Malins* held, on demurrer, that the wife took a life-interest, with a power of disposition among the children, the extent of which must be determined at the hearing of the cause. In both those cases the learned Judges held that there was a trust created, and that the wife did not take absolutely. But in *In re Hutchinson and Tenant* (4) those two cases were referred to, and the Master of the Rolls' comment on them is this (5): "I have been referred to two authorities decided since *Lambe* v. *Eames*, and apparently in conflict with it, but they are decisions of inferior Courts, and no number of decisions by inferior Courts can

(1) Law Rep. 6 Ch. 597.
(2) Ibid. 17 Eq. 320.
(3) Law Rep. 18 Eq. 414.
(4) 8 Ch. D. 540.
(5) 8 Ch. D. 543.

overrule a decision of a superior Court. In my opinion the decision of the Court of Appeal in *Lambe* v. *Eames* (1) covers this case, and I shall therefore follow it."

Now, when I look at the will in the present case, I cannot help seeing that, if I were to construe it in the manner in which I am asked, on behalf of the vestry, to construe it, I should make it practically repugnant to itself, because the gift is of "all my real and personal estate and effects whatsoever and wheresoever, unto and to the absolute use of my wife, her heirs, executors, administrators, and assigns." There is as plain a gift to the wife for her own absolute use and benefit as words can express. It goes on, "in full confidence that she will do what is right as to the disposal thereof between my children, either in her lifetime or by will after her decease." If I were to hold that that creates a trust for the children, then, according to my reading of the will, it would exclude the wife from any benefit or interest whatsoever. It is a trust to dispose of the property, either by deed or will, for the benefit of the children. I cannot understand that to mean that she was to take a life interest, not being obliged to dispose of the property among the children until after her decease by her will, but I think it means you may dispose of it by will, but you must dispose of it for the benefit of the children. If you leave anything undisposed of by deed, then you are to dispose of the remainder by will. Under these circumstances I am very glad to find that the current of modern authority goes to shew that such words are to be construed in accordance with that which I am convinced was the intention of the testator in a case of this kind, not to create a trust, but simply to express his confidence that his wife would do that, according to her own judgment unfettered and uncontrolled, which would be for the benefit of her children. I hold, therefore, that the second objection fails, and that Mrs. *Smith* was absolutely entitled, and could make a good conveyance to *Charles Adams*.

Solicitors for vestry: *Pontifex, Hewitt, & Pitt.*
Solicitors for vendor: *Lucas & Sons.*

(1) Law Rep. 6 Ch. 597.

W. L. C.

FRY, J.

1883

March 15.

SWIFT *v.* PANNELL.

[1883 S. 1292.]

Bill of Sale—"Order and Disposition"—Bills of Sale Acts, 1878 *and* 1882 (41 *&* 42 *Vict. c.* 31; 45 *&* 46 *Vict. c.* 43).

The *Bills of Sale Act*, 1882, repeals the 20th section of the *Bills of Sale Act*, 1878, in respect of bills of sale given by way of security, but not in respect of bills of sale given by way of absolute transfer, and therefore chattels comprised in a registered bill of sale given by way of absolute transfer are not in the order and disposition of the grantor within the *Bankruptcy Act*.

BY a bill of sale dated the 22nd of December, 1882, and registered on the 27th of December, 1882, chattels were granted to the Defendant by way of absolute transfer.

The grantor being bankrupt, the trustee in bankruptcy instituted this action to restrain the grantee from selling the chattels on the ground that they were in the order and disposition of the bankrupt.

The question for decision was whether the 20th section of the *Bills of Sale Act*, 1878, which enacted that chattels comprised in a registered bill of sale should not be deemed to be in the order and disposition of the grantor within the *Bankruptcy Act*, is or is not still in force.

Warrington, for the Plaintiff:—

The *Bills of Sale Amendment Act*, 1882, has repealed the 20th section of the *Bills of Sale Act*, 1878.

Cozens-Hardy, Q.C., and *A. àB. Terrell*, for the Defendant:—

The effect of the Act of 1882 is to repeal the 20th section of the Act of 1878 as to bills of sale given by way of security, but not as to bills of sale given by way of absolute transfer.

FRY, J.:—

The question which I have now to determine is one to my mind of some difficulty, and I am not very clear as to what the

true construction of the Act is. At the same time I have formed an opinion, which I am about now to pronounce.

The *Bills of Sale Act*, 1878, contained a definition of "bill of sale," which applied to documents whether given by way of absolute transfer or by way of security, and it contained, as we all know, a number of provisions requiring the registration of the bill of sale in certain circumstances, and provided by the 20th section that chattels comprised in a bill of sale which had been duly registered should not be deemed to be in the possession, order, or disposition of the grantor within the meaning of the *Bankruptcy Act*, 1869. Then came the *Bills of Sale Act*, 1882, which is intituled "An Act to amend the *Bills of Sale Act*, 1878," and the *Bills of Sale Act*, 1878, is therein referred to as "the principal Act," and the 3rd section comprises this paragraph: "The expression 'bill of sale' and other expressions in this Act have the same meaning as in the principal Act, except as to bills of sale or other documents mentioned in section four of the principal Act, which may be given otherwise than by way of security for the payment of money, to which last mentioned bills of sale and other documents this Act shall not apply." It appears to me, therefore, that the scope of that section is to leave entirely unaffected by the present Act any bill of sale by way of absolute transfer, and to regulate one set of bills, namely, those by way of security, by the Act of 1882, and to regulate the other set of bills of sale, namely, those by way of absolute transfer, by the Act of 1878. Then the 15th section is in these terms: "The eighth and the twentieth sections of the principal Act, and also all other enactments contained in the principal Act which are inconsistent with this Act, are repealed, but this repeal shall not affect the validity of anything done or suffered under the principal Act before the commencement of this Act." It is plain that no enactment in the principal Act which relates to absolute bills of sale can be inconsistent with this Act, because this Act relates only to bills of sale by way of security, but no doubt the words are "the eighth and twentieth sections of the principal Act shall be repealed," and that would be a plain repeal but for the words of the third section, which appear to me to confine the whole operation of the Act to bills of sale by way of security. Now if the meaning of the

FRY, J.
1883
SWIFT
v.
PANNELL.

Legislature had been that the 15th section should apply to all bills of sale whether by way of security or absolute transfer, I think there would have been no difficulty whatever in expressing that. It might have been expressed by simply interposing in the 3rd section these words, "to which last-mentioned bills of sale and other documents this Act, except the fifteenth section, shall not apply." By that, or similar language, the 15th section might have been made to have a general application. It appears to me that that conclusion is very intelligible, and that it leaves the absolute bills of sale to be regulated by the older law.

In putting the construction which I have just expressed on the Act it appears to me that I am following the very words of the Act. I am holding that to absolute bills of sale the Act does not apply, and at the same time I have arrived at a conclusion which, whether it was in the mind of the Legislature or not, is a perfectly intelligible and coherent one. I think, therefore, that that is the true meaning, and consequently that the Plaintiff is entitled to the injunction.

Solicitors: *Goldring & Mitchell; Warner Temple.*

C. W. C.

In re CAMPDEN CHARITIES (No. 2).

CHITTY, J.

1883

April 9.

*Church Building Acts—District Parishes—Charity—Scheme—Apportionment—Discharge of Order—Jurisdiction—*52 *Geo.* 3, *c.* 101 [*Revised Ed. Statutes vol. v. p.* 164]—8 *& 9 Vict. c.* 70, *s.* 22 [*Revised Ed. Statutes, vol. ix. p.* 883].

Where under the *Church Building Acts* district parishes have been formed out of an original parish, and the Court has, under sect. 22 of the *Church Building Act*, 8 & 9 Vict. c. 70, made an order apportioning a charitable gift between these district parishes and the remainder of the original parish, such order is not to be treated as final, but the Court has jurisdiction to make fresh orders from time to time to meet the changing circumstances of such district parishes or original parish, either by discharging or varying former orders made under the section.

By an order made in 1852, upon a petition presented under the *Church Building Act*, 8 & 9 Vict. c. 70, and *Sir Samuel Romilly's Act*, 52 Geo. 3, c. 101, the Court, acting under sect. 22 of the former Act, apportioned the income of certain charities established for the benefit of the poor of the parish of *K.*, between five district parishes, which had been formed out of that parish, and the remainder of that parish, and directed the trustees of the charities to apply the income in the specified proportions. Further district parishes having been subsequently formed out of the parish of *K.*, one of them having had assigned to it a portion of one of the original five districts, in 1879 a scheme was settled by the Charity Commissioners appropriating the income of the charities to certain objects, the scheme also providing that the trustees of the charities were, in the application of the income, to have regard to the apportionment of 1852. It being found, owing to the changes that had taken place since the order of 1852 in the populations of the various districts constituting the parish of *K.*, impracticable to carry out the scheme of 1879 while retaining the apportionment directed by the order of 1852, the trustees presented a petition under the above Act for the discharge of that order:—

Held, that the Court had jurisdiction to discharge the order, which was discharged accordingly.

PETITION.

The main facts of this case will be found in the recent report of *In re Campden Charities* (1), and, therefore, for the purpose of the present report, it is only necessary to state the following additional particulars.

Under the Charity Commissioners' scheme of 1879, which, with some variations, was confirmed by the Court of Appeal on the

(1) 18 Ch. D. 310.

CHITTY, J. 1883 *In re* CAMPDEN CHARITIES (No. 2).

27th May, 1881, as already reported, the trustees of the charities were, in the application of the income under the scheme, to have regard to the apportionment directed by the order of the 23rd of December, 1852, which, it should be mentioned, was made on a petition presented under the *Church Building Act*, 8 & 9 Vict. c. 70, and *Sir Samuel Romilly's Act*, 52 Geo. 3, c. 101. Difficulties, however, arose in giving effect to the scheme in consequence of the altered conditions of the parish of *St. Mary Abbotts, Kensington*, since the date of the order of 1852. It appeared that since that order the five district parishes mentioned in the former report and the remainder of the mother parish had been from time to time further subdivided into additional ecclesiastical districts under the *Church Building Acts;* for instance, the new district of *St. Philip's, Earl Court*, had been formed partly out of the old district of *St. Barnabas*, and partly out of the mother parish: the result being that the parish of *St. Mary Abbotts* now comprised, in addition to that portion of the parish forming the district attached to the old parish church, twenty-one ecclesiastical districts.

The Petitioners, the trustees of the charities, who were also ratepayers and inhabitants of the parish of *St. Mary Abbotts*, finding a difficulty in distributing the income of the charities according to the new scheme of 1879, and at the same time retaining the apportionment under the order of 1852, were desirous, with a view to the efficient working of the scheme, that the application of the income of the charities might be relieved from the apportionment of 1852; accordingly, with the sanction of the Attorney-General, they presented this petition under the *Church Building Act*, 8 & 9 Vict. c. 70, and *Sir Samuel Romilly's Act*, 52 Geo. 3, c. 101, asking that the order of 1852 might be discharged.

From the evidence in support of the petition it appeared that the population of the parish of *Kensington*, inclusive of the several districts, had risen from 44,000 in 1851, to upwards of 162,000 in 1881, and that the result of the order of 1852 was that the trustees had been in many cases obliged to make grants to persons to whom they would not have made grants if the whole of the charity funds had been applicable to all parts of the parish, as much more deserving cases in other districts had been passed

over in consequence of the funds not being applicable to cases in those districts. The following figures afford an example of the unsatisfactory apportionment at present subsisting under the order of 1852.

By the order of 1852 the income of the charities was divided among the then existing district parishes in eighty-eighth parts, of which seventeen eighty-eighths were apportioned to the district parish of *St. John, Notting Hill,* and twenty-five eighty-eighths were apportioned to "the remaining part of the parish of *St. Mary Abbotts.*" At the census of 1881 the population of this remaining part of the old parish, including three new districts which had been carved out of it since the order of 1852, was 26,313, while the population of the old district of *St. John, Notting Hill,* comprising the poorest part of the population within the area of the old parish of *St. Mary Abbotts,* driven northwards by the building of better classes of houses, amounted at the same period to no less than 69,449. Thus under the order of 1852 twenty-five eighty-eighths of the income of the charities stood apportioned to a population of 26,313, but only seventeen eighty-eighths to a population, and that the poorest, of 69,449. Similarly the relative proportions of the populations of the other districts had materially changed since the old apportionment of 1852. It was therefore obvious that some new method of distributing the income of the charities was desirable in order to meet the requirements of the various districts and of the remaining portion of the old parish; and the only question really was whether the Court had, under the *Church Building Act,* 8 & 9 Vict. c. 70, jurisdiction to discharge or vary an order of apportionment made under that Act, or whether such an order when once made was final.

The order of 1852 was made in pursuance of sect. 22 of that Act, which section will be found set out in full in a note to *Ex parte Incumbent of Brompton* (1), being the report of the hearing of a petition for the apportionment of the *Campden Charities.* The incumbents and churchwardens of the district parishes named in the order of 1852 had been served with the present petition, but did not appear by counsel at the hearing.

(1) 5 De G. & Sm. 626.

CHITTY, J.

1883

In re CAMPDEN CHARITIES (No. 2).

Ince, Q.C., and *F. A. Lewin*, for the Petitioners :—

There is nothing in sect. 22 of the Act 8 & 9 Vict. c. 70, which says that an order of apportionment when once made shall be final: the section is, in fact, entirely silent upon the subject. But it seems in the highest degree improbable that the Legislature could have intended any such order to be final. It would be singular to attribute to Parliament an intention to alter the mode of distribution of particular charities for all time, without regard to future exigencies.

It is clear in the present case, having regard to the lapse of time, the mode in which the parish of *Kensington* is now subdivided, and the changes in population, that under the order of 1852 the income of the charities cannot be applied in the manner most beneficial to the poor of the parish who are the special objects of the charities. We submit, therefore, that the case is one in which the *cy-près* doctrine should be applied: *In re Campden Charities* (1). The apportionment of charities amongst particular districts is a matter for the discretion of the Court: *Ex parte Incumbent of Brompton* (2); *In re West Ham Charities* (3); and we submit that this discretion may be exercised from time to time as occasion arises.

Davey, Q.C., and *Cecil Russell*, for the Attorney-General :—

The Attorney-General and the Charity Commissioners are desirous that the order now asked for should be made, provided your Lordship considers you have jurisdiction to make it. The point seems, however, open to some doubt. We submit that the effect of the order of 1852 was the same as if the district parishes therein mentioned had been named in the foundation-deed of the charities, and the donor had thereby himself directed the distribution of the income. The districts having been carved out and the apportionment once made, that apportionment must be taken for better for worse, it being in the nature of a permanent endowment for each district. There is nothing in the section indicating that the Court may from time to time apportion and re-apportion, or that the Court is from time to time to have regard to the

(1) 18 Ch. D. 310. (2) 5 De G. & Sm. 626.
(3) 2 De G. & Sm. 218.

changing circumstances of particular districts. The direction in the section that apportionments shall be registered seems to indicate that when once made they are to be treated as final.

Ince, in reply :—

The direction as to registration would seem to apply to the apportionment of debts and charges only. The section is wholly silent as to the finality of any order; but it has undoubtedly been the practice of the Court, under *Sir Samuel Romilly's Act*, to alter and vary schemes from time to time, although that power is not expressly reserved by the Act; and by analogy that should be the practice under the Act 8 & 9 Vict. c. 70. The very object of the 22nd section is the better administration of the particular charity, and the section is really an extension of the jurisdiction conferred by the doctrine of *cy-près*, because it allows the Court to exclude objects falling within that doctrine. Moreover, *Sir Samuel Romilly's Act* gives the Court power to make schemes in a way which the *cy-près* doctrine has never enabled it to do. If the Court can make a scheme, whether it be scheme proper or apportionment, there must be inherent jurisdiction to alter it in case of necessity. With regard to the argument that there is a separate endowment for each district, it is to be noticed that the order of 1852 does not sever the income into distinct portions payable to the incumbents and churchwardens of the several districts, but it is to remain one fund to be applied in the specified proportions by the trustees alone.

CHITTY, J.:—

This is a petition under the Act of 8 & 9 Vict. c. 70, which is an Act for the further amendment of the *Church Building Acts*, and under the Act of 52 Geo. 3, c. 101, commonly called *Sir Samuel Romilly's Act*, asking for the discharge of an order made by the Court of Chancery in 1852; and the question, which is one of some importance, raised by the petition is whether the jurisdiction which is conferred upon the Court by that Act is one which can be exercised from time to time, or whether an order once made apportioning the income or the benefits of the charity is not final.

CHITTY, J. 1883 *In re* CAMPDEN CHARITIES (No. 2).

The section on which the question turns is silent on two points. There is no express statement in the section that the orders made by the Court under the jurisdiction thus conferred are to be final—that they are not liable to be reopened; and, on the other hand, the section is silent as to whether the Court has power from time to time to make orders either discharging a former order or varying orders which have already been made. The Court being left, therefore, to find out as well as it can what was the true intent of the Legislature in framing this section, must have regard to general principles in coming to its determination.

Now it appears to me that in substance the new jurisdiction which is conferred on the Court by the Act in question is one which extends the power of the Court to make schemes. Schemes, as is well known, were made from time to time by the Court of Chancery, and may now be made by this Division, in which the powers of the Court of Chancery of making schemes are now vested; and in making those schemes the Court is at liberty to depart, to some extent, from the trust as originally declared. The late Master of the Rolls in giving his judgment in *In re Campden Charities* (1), says (2), "In the first place, the scheme is made in pursuance of what is commonly known as the *cy-près* doctrine, and, in cases like this, it is applied where, from lapse of time and change of circumstances, it is no longer possible beneficially to apply the property left by the founder or donor in the exact way in which he has directed it to be applied, but it can only be applied beneficially to similar purposes by different means."

When properly considered, the power under the *cy-près* doctrine is a power which the Court has exercised from time to time of departing, within certain recognised limits, from the original deed or instrument whereby the particular charity was founded. The Court has limited itself, generally speaking, in this way—that inasmuch as you cannot at the present time apply the benefit of the charity so as to give effect to the original intention of the donor, the circumstances and the nature of the charity itself, and the circumstances even of the country, having so varied

(1) 18 Ch. D. 310. (2) 18 Ch. D. 323.

since the original creation of the charity, you must endeavour to apply its benefits to the present time according to what may be called the spirit of the charity.

Now it appears to me that the power which, as I have said, is conferred on the Court by the Act of 8 & 9 Vict. c. 70, is a power or jurisdiction given in extension of the jurisdiction which the Court formerly possessed; and I think that is plain from this consideration, that the apportionment between the new districts created under the *Church Building Acts* would have been, and the Legislature certainly considered it would have been, too wide a departure to be justified under the *cy-près* doctrine, and accordingly the 22nd section was introduced. The result, to my mind, is this, that the Act confers upon the Court a further and better jurisdiction with regard to the administration of the charity; that is to say, it gives it an additional power of administration where circumstances have altered. The alteration of the circumstances here consists in the fact that a portion of the parish having been lawfully cut up into different new districts, it may be proper to apportion the benefit between the newly created districts as well as the old.

The question which I have to decide has not been before the Court, so far as I can discover, upon any other occasion. In *Ex parte Incumbent of Brompton* (1), Vice-Chancellor *Parker* expressed his opinion that it was not absolutely imperative on the Court to exercise the jurisdiction conferred upon it by the Act; and with respect I may say I concur in that view of the Act. Having regard, as he did, to the subject-matter of the statute, and to its various provisions, he came to the conclusion that the Court had a discretion whether it would or would not apply the provisions of the Act to a particular case; and he seems to have treated the provisions of the 22nd section as provisions relating to the administration of the charity. If I am right in my view, the result appears to be this, that inasmuch as the Court always had a discretion, when circumstances had altered, to vary the schemes it had itself made, it had this additional power which is, as I have said, a power of the same nature—a power capable of being re-exercised from time to time in the same

(1) 5 De G. & Sm. 626.

CHITTY, J. 1883 *In re* CAMPDEN CHARITIES (No. 2).

manner as the Court could from time to time exercise its jurisdiction of making and varying schemes. For these reasons it appears to me that there is a jurisdiction in the Court to vary an order such as the order of 1852.

Now the order of 1852 is an order which directed the apportionment of the income between the various districts which had been previously created. Since that order various new districts have been created out of the area of the original parish; and it seems that one at least of the new districts created since the order was made is a district which has been carved out partly from a district that was existing at the date of the order of 1852, and partly from the remainder of the mother parish. That is to say, the new district of *St. Philip* is formed out of a portion of the mother parish of *St. Mary Abbotts*, and out of a portion of *St. Barnabas*, which was a district that had been carved out of the mother parish. This circumstance appears to me to afford some sort of clue to the construction of the Act. I go mainly on the principles I have already stated, that inasmuch as the districts themselves may be varied from time to time under the *Church Building Acts*, it would be a strange thing to say that the power of apportionment once exercised is exercised finally, and that it could not be exercised from time to time so as to render the apportionment suitable to the various exigencies of the case, and so as to give to the new districts, and particularly to new districts of the kind I have mentioned, a new apportionment. This would not be strictly a sub-apportionment: for instance, *St. Barnabas* had apportioned to it under the order nine eighty-eighths, and *St. Mary Abbotts* twenty-five eighty-eighths: however, the question does not arise as to sub-apportioning what *St. Barnabas* took or what *St. Mary Abbotts* took, but it would be necessary, it appears to me—and there would be jurisdiction to do this—to make a new apportionment of the entire fund, taking a portion, it may be said, partly out of one district and partly out of another; but then that seems to me to be not sub-apportionment but re-apportionment.

Now the order of 1852 did not break the charity into distinct parts, but left the administration of the charity in the hands of trustees; and in substance the order was a mere direction to them

as to how they should apply the various apportioned parts. It did not—although the Act of Parliament would have warranted it in doing so—direct that the application of the apportioned parts should be made by the incumbent and churchwardens of the various districts which had been created; but, as I have said, it has left the administration of the charity, as an entire charity, in the hands of trustees.

Ought I, then, to accede to the present application? There is really but one view on the subject. Not only do the Petitioners come and ask to have the order of 1852 discharged so as to leave the trustees at liberty to apportion the fund from time to time among the various districts, but the various ecclesiastical divisions, who are interested in maintaining the apportionment directed by the order of 1852, by not appearing before the Court seem to me to adopt the view of the Petitioners, and say it is expedient that the order now asked for should be made if there is jurisdiction to make it. The Charity Commissioners appear to take the same view, and the Attorney-General, who is assisting the Court by his counsel in bringing forward the legal and technical objections, if there be any, to the making of the order, also takes the same view as to the propriety of the order being made if the Court has jurisdiction.

It is not necessary, therefore, for me to travel through the facts with reference to the altered circumstances. It is, perhaps, sufficient to say, shortly, that when the order of 1852 was made the population of the parish, including all the districts, was somewhere about 44,000, and that at the present time it is nearly quadruple, the total population being upwards of 162,000. The apportionment made by the order is, it is clear, wholly inappropriate to the new state of circumstances, the amount apportioned to the wealthier and less populous districts being far out of proportion to that apportioned to the poorer and more populous districts. I cannot for one moment hesitate to say that, so far as the propriety of making the order is concerned, the Petitioners are perfectly entitled to what they ask. Some care, however, must be taken to guard against the danger which arises in a case of this kind of the Court exceeding its jurisdiction when what is asked is clearly beneficial to all parties, and there is no real opposition. The

CHITTY, J. 1883 *In re* CAMPDEN CHARITIES (No. 2.)

Attorney-General's opposition, as I have said, consisted only in pointing out the difficulties which occurred to him in the way of making the order.

Upon the whole I think I have jurisdiction to make the order, and that I ought to make it. The result is, that I accede to the prayer of the petition by discharging the order of 1852 so far as relates to the apportionment.

Solicitors: *Green & Hartcup; Clabon.*

G. I. F. C.

CHITTY, J. 1883 *June* 18.

In re MARCH. MANDER *v.* HARRIS.

[1883 M. 1931.]

Husband and Wife—Unity of Person—Will—Gift to Husband and Wife and Third Person—Married Woman—Separate Use—Married Women's Property Act, 1882.

Having regard to the *Married Women's Property Act*, 1882, the old rule of law that husband and wife were for most purposes one person, so that under a gift by will to a husband and wife and a third person the husband and wife took only one moiety between them, the third person taking the other moiety, is no longer applicable to such a gift under a will that has come into operation since the commencement of that Act.

A testatrix, by her will dated in 1880, gave her residuary personal estate "to *C. J. M.* and *J. H.* and *E.* his wife to and for their own use and benefit absolutely"; and appointed "*C. J. M.* and *J. H.* and *E. H.* his wife" her executors.

The testatrix died in 1883, after the commencement of the *Married Women's Property Act*, 1882. *J. H.* and *E. H.* married in 1864:—

Held, that the residuary personal estate was divisible in thirds and not in moieties, and that *E. H.* took one-third for her separate use.

FANNY ELIZABETH MARCH, widow, by a holograph will dated the 8th of December, 1880, devised and bequeathed certain specific articles and all the residue of her real and personal estate "unto my residual legatee (*sic*) *Charles James Mander*, Esq., No. 9, *New Square, Lincoln's Inn, London*, and *James Harris*, Esq., and *Eliza Maria* his wife, of *Knowle Green, Staines, Middlesex*, to and for their own use and benefit absolutely." And she appointed "*Charles James Mander*, Esq. (of, &c.), and *James*

Harris, Esq., and *Eliza Maria Harris* his wife (of, &c.)" executors of her said will.

The testatrix died on the 26th of April, 1883, possessed of personal estate only, and no real estate.

James Harris and *Eliza Maria Harris* married in 1864.

This action was instituted by *C. J. Mander* against Mr. and Mrs. *Harris* to obtain a declaration that according to the true construction of the will the estate of the testatrix was divisible in moieties, and that the Plaintiff was entitled to one of such moieties.

The Defendants demurred to the statement of claim on the ground that having regard to the terms of the will and to the provisions of the *Married Women's Property Act*, 1882, the estate of the testatrix was divisible in equal thirds and not in moieties, and that the Plaintiff was entitled only to one-third.

Macnaghten, Q.C., and *Bardswell*, for the demurrer:—

The Plaintiff's contention is based upon the old rule of law that under a gift to a husband and wife and a third party the husband and wife only take one share between them, on the ground that they are in law one person: *Co. Litt.* (1); *Blackstone's* Commentaries (2). But this rule has not been held invariably to apply, even on the old authorities. For instance, in *Warrington* v. *Warrington* (3), a case similar to the present, a testatrix gave her residuary estate equally between her brother, her sister, and her nephew *W.* and *E.* his wife; and it was held that the husband and wife took one share each and not merely one between them. So, in *Marchant* v. *Cragg* (4), where the gift was "equally between my brother *W. S.* and his wife *Jane* and my sisters *M. M.* and *S. S.* during their lives and the life of the survivor of them," it was held that *W. S.* and his wife took two-fourths and not one-third. On the other hand, in *Bricker* v. *Whatley* (5), where the gift was to *A.*, *B.*, and *C.* and the wife of *C.* equally, it was held upon the construction of the will that *C.* and his wife took but one-third; and we admit that if the present case had occurred

(1) Page 187 a.
(2) Bk. 1, ch. 15, s. 3, Kerr's 4th Ed. p. 418.
(3) 2 Hare, 54.
(4) 31 Beav. 398.
(5) 1 Vern. 233.

CHITTY, J.
1883
In re MARCH. MANDER *v.* HARRIS.

prior to the recent *Married Women's Property Act*, there would have been a difficulty in distinguishing it from that case. *In re Wylde* (1) is also an authority shewing that the old legal doctrine does not prevail against the terms of the instrument. An examination of the old authorities, in fact, seems to shew that the Court was disposed to lay hold of anything in the instrument as a ground for giving a distinct and separate interest to the wife. In the recent case of *Dias* v. *De Livera* (2), which was a case under the Roman-Dutch law, the Privy Council expressly stated that the English Courts have been in the habit of holding that any indication, however slight, of an intention that the husband and wife shall each take separately is sufficient to defeat the application of the doctrine laid down by *Littleton*. The Roman-Dutch law differed from the English law as it stood prior to the recent statute, by refusing to recognise that the personality of the wife merged in that of her husband, and accordingly, as in the case last referred to, it has, under a gift to a husband and wife, allowed them each to take a separate share. It is not, however, necessary, for the purpose of deciding this case, to consider the effect of the above and similar authorities, for the new statute, the *Married Women's Property Act*, 1882, has now entirely altered the old *status* of husband and wife, its effect being to place a married woman in the same position as under the Roman-Dutch law; indeed it makes an even more complete separation of husband and wife than under that law, for it enables her to hold property and to sue and be sued just as if she were unmarried. Sect. 1 provides that a married woman shall be capable of holding property and contracting in the same manner as if she were a *feme sole*. Then sect. 5 enacts that property acquired after the Act by a woman married before the Act—a section which expressly applies to the present case—shall be held by her as a *feme sole*. Sect. 12 says that a married woman shall have the same remedies against all persons, including her husband, for the protection and security of her separate property, as if she were a *feme sole*; and sect. 16 renders the wife liable to criminal proceedings by her husband for an act done by her with respect to his property. In the present case, it is clear from the terms of the

(1) 2 D. M. & G. 724.

(2) 5 App. Cas. 123.

gift that the wife takes at all events some share, and we submit that upon the construction of the Act she takes one-third. There can be no doubt that as the will came into operation on the death of the testatrix in 1883 it must be read as if executed after the commencement of the Act: *Hasluck* v. *Pedley* (1).

Ince, Q.C., and *R. F. Norton*, for the Plaintiff:—

We do not dispute that the will should be treated as if executed since the commencement of the *Married Women's Property Act*, 1882, but we submit that upon the construction of the will the husband and wife take one share between them, the first "and" dividing the gift so as to give one share to the Plaintiff, *Mander*, "and" another share to Mr. and Mrs. *Harris*. *Bricker* v. *Whatley* (2) is an authority directly in favour of this mode of construction. If, however, the true construction of the will is doubtful, then the Court is, as in *In re Wylde* (3), thrown back upon the law, and the question is whether the *status* of the husband and wife as one person under the old legal doctrine is in any way altered by the new Act. The doctrine is thus stated by *Littleton* (4): "Also, if a joint estate be made of land to husband and wife and to a third person, in this case the husband and wife have in law in their right but the moiety, and the third person shall have as much as the husband and wife, viz., the other moiety, &c. And the cause is, for that the husband and wife are but one person in law, and are in like case as if an estate be made to two joint tenants, where the one hath by force of the jointure the one moiety in law, and the other, the other moiety, &c. In the same manner it is where an estate is made to the husband and wife and to two other men, in this case the husband and wife have but the third part, and the other two men the other two parts, &c." Then the authorities for this proposition are given by *Coke* (5). We submit that the Act of 1882 makes no alteration in the legal *status* of husband and wife, but simply deals with such property as the wife herself may be entitled to. The object of the Act is, as expressed in the preamble, merely to amend the

(1) Law Rep. 19 Eq. 271.
(2) 1 Vern. 233.
(3) 2 D. M. & G. 724.
(4) Co. Litt. 187 a.
(5) Co. Litt. 187 a, 187 b.

CHITTY, J. 1883 *In re* MARCH. MANDER *v.* HARRIS.

Married Women's Property Act, 1870: it does not give a married woman any property which she could not have been entitled to previously. The effect of the Act is this, that where a gift is made to a married woman alone she takes a separate interest in it by virtue of the Act; but where the gift is to her and her husband the old law still applies and regards it as a gift to a composite or dual person; and it is clear that under a gift to a husband and wife and a third person, the wife never took anything, otherwise under such a gift of personalty the husband would have taken two-thirds, and the third person the other third.

[CHITTY, J.:—But the Act gives a married woman a new or enlarged capacity to acquire property.]

No, it only alters the result of an acquisition. A married woman could always acquire any property, but she acquired it for her husband. What the Act does is to secure to her for her separate use the property which she herself acquires, that is property to which she would have become entitled independently of the Act, and of which, but for the Act, the husband would have taken the benefit; but under such a gift as this she never could acquire anything, and there is nothing in the Act which gives her anything to which she had no right before the Act. The Act, in short, leaves the compound person untouched. It is clear from the subsections of sect. 1 that the Act is dealing only with such property as is given to or acquired by the married woman herself, and not herself and her husband; and there is nothing in the Act which affects or alters her right or her husband's right to any property as between themselves and third persons; the Act only alters the rights of husband and wife *inter se*.

[CHITTY, J.:—What do you say to sect. 16?]

It may be doubted whether that section applies to a marriage before the Act. This is a question of *status* and not of property; and we submit that the Act deals only with property and not *status*.

The married woman may perhaps be entitled to some interest in her husband's moiety, but with that we have nothing to do.

CHITTY, J.:—

In this case a testatrix, who died after the commencement of the *Married Women's Property Act*, 1882, but who made her will before the Act came into operation, the will being dated the 8th of December, 1880, has given her residuary personal estate (it is admitted she had no real estate) in these words: "Unto my residual legatee, *Charles James Mander*, Esq., No. 9 *New Square, Lincoln's Inn, London*, and *James Harris*, Esq., and *Eliza Maria* his wife, of *Knowle Green, Staines, Middlesex*, to and for their own use and benefit absolutely." And then she goes on to appoint *C. J. Mander*, giving his address as before, and *James Harris* and *Maria Harris* his wife, again giving their addresses, executors of her will. The question is whether Mr. and Mrs. *Harris* take one share between them, or whether they take each a separate share so that the residuary personal estate is divisible in thirds instead of moieties.

It is admitted at the bar that if this will had come into operation before the commencement of the *Married Women's Property Act*, 1882, *Mander* would have taken one moiety, and *Harris* and his wife would have taken as joint tenants one moiety only. The question then is, what is the effect of the Act upon the interest of *Harris* and his wife?

The reason of the rule which prevailed, and which, subject to the Act, still prevails, namely, that a husband and wife, where there is a gift made to them and to a third party, only take one share between them, is stated in *Coke upon Littleton* (1) as follows: "The cause is, for that the husband and wife are but one person in law, and are in like case as if an estate be made to two joint-tenants, where the one hath by force of the jointure the one moiety in law, and the other the other moiety."

That is not quite correct even as a statement of the law in *Littleton's* time: husband and wife are one person in law, according to the more accurate language used by the Privy Council, for most purposes, but not for all. That being so, on the question of construction of a gift such as I have stated it was held, necessarily, that the husband and wife, being one person, took but one share.

(1) Page 187 a.

CHITTY, J. 1883 *In re* MARCH. MANDER *v.* HARRIS.

Whether that was reasonable or not I need not stop to consider, but to some minds it would probably appear to be unreasonable.

I will now proceed at once to the case before the Privy Council, because, although that case is not absolutely binding on the High Court, yet a judgment of the Privy Council is always received with great respect.

In *Dias* v. *De Livera* (1) the Privy Council had before it a question of the construction of a will, the question being—so far as the particular matter now before the Court is concerned—whether *Merciana Dias* and her husband took one share or two shares. Their Lordships, in considering the question, agreed with the Supreme Court of *Ceylon*, and the judgment of that Court dealt with the subject at some little length. It begins by stating (2), that "At English Common Law, as *Littleton* lays it down, because husband and wife are one person only, if a joint estate in land be conveyed to husband and wife and a third person, the husband and wife shall take one moiety and the third person the other, and that, although at English Common Law the wife's freeholds are not the husband's absolute property." [His Lordship read down to the words (3): "The personality of the wife cannot be said to be merged in that of the husband under Roman-Dutch law," and continued:—] Then the judgment proceeds to point out the difference between the English and Roman-Dutch law upon this question, the husband and wife, according to the Roman-Dutch law, each taking one share. As I have already said, the Privy Council agreed with the judgment of the Supreme Court on that point. In delivering judgment, their Lordships say this: (4) "On the question whether *Merciana* and *Dias* took one share or two, their Lordships agree with the Supreme Court. The rule of English law that a gift to a man and his wife, and to a third person, is to be construed as a gift of a moiety to the husband and wife and a moiety to the third person, is founded on the doctrine of English law that husband and wife are, for most purposes, one person. And yet any indication, however slight, of an intention that each shall take separately has

(1) 5 App. Cas. 123.
(2) Ibid. 125.
(3) 5 App. Cas. 126.
(4) Ibid. 135.

been held to defeat the application of this doctrine." Then they refer to certain well-known cases on the subject. [His Lordship then read down to the words (1) "directing its division into three parts", and continued:—] I have cited the judgment of the Privy Council at length, because it appears to me to shew clearly the principle upon which their Lordships proceeded. It is this, that according to the English law a husband and wife are, for most purposes, taken to be one person; and that has reference particularly to the relation of husband and wife as regards property, which is a most important consideration in the present case.

Now, under the *Married Women's Property Act*, 1882, is it true to say that husband and wife are one person for most purposes with reference to property? It appears to me there has been so extensive an alteration made in the law by this Act, that it would be wrong to apply any longer to the construction of a gift by will the old principle upon which the Courts formerly acted, namely, that for most purposes husband and wife are one person. The alteration made by the Act is such that it is incumbent on the Court to apply, according to the Privy Council, to a gift such as this, namely, to a husband and wife and a third person, its most natural construction.

I will read one or two sections of the Act, in order to shew what the nature of the alteration in the law is.

The first section says, in sub-sect. 1, "A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee." It appears to me that this section enlarges the capacity of a married woman. Her capacity formerly was that she could not take property which went to her husband. There were, no doubt, exceptions made in equity with regard to her right to a settlement; but here her *status* is changed and she is made capable of acquiring personal property in the same manner as if she were a *feme sole*.

The 2nd sub-sect. of sect. 1 also enlarges her capacity, because it confers upon her the capacity of entering into contracts,

(1) 5 App. Cas. 136.

CHITTY, J.
1883
In re MARCH. MANDER *v.* HARRIS.

and also of suing and being sued. Then sub-sect. 3 proceeds on the same principle, for it provides that "every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown." Sub-sect. 4 extends what has gone before by providing that every contract binding a married woman's separate property shall bind all her present and after-acquired property. Sub-sect. 5 provides that every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*.

Then sect. 12 provides that every woman, whether married before or after the Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and, with an exception I need not read, the same remedies and redress by way of criminal proceedings, for the protection and security of her own personal property, as if such property belonged to her as a *feme sole*. Then sect. 16 renders her liable to be proceeded against criminally, on the prosecution of her husband with respect to his property, to the same extent as he is in respect of her property.

It appears to me that the Act makes such alterations in the relation of husband and wife that it severs that unity of person, and divides that compound person which the law formerly recognised, to such an extent as to render it wrong for the Court to apply the old principle which was founded on unity of person.

On these grounds, shortly, I am of opinion that this property is divisible in thirds, subject to the joint tenancy being severed; I therefore decide that there is a joint tenancy, and that *Mander* takes one-third, Mr. *Harris* one-third, and Mrs. *Harris* the remaining third; and the order I make is that "the Court being of opinion that the three persons named take as joint tenants, and that *Mander* takes one-third, Mr. *Harris* one-third, and Mrs. *Harris* the remaining third for her separate use, the demurrer be allowed."

There is one point I should mention in case the matter should go further, and it is this: in the argument the Plaintiff's counsel felt they could not contend that there would have been any

distinction if the will had been executed since the date fixed for the commencement of the Act of 1882. The effect would have been the same, of course subject to this—that the will comes into operation after the date fixed for the commencement of the Act. They properly admitted that the effect would have been the same, and indeed they could not have avoided making that admission after the decision of the late Master of the Rolls in *Hasluck* v. *Pedley* (1). It is also admitted that the appointment of the wife as executrix operated to make her a separate and independent executrix, though this is provided for by the 18th and 24th sections of the Act.

Solicitors: *Burton, Yeates & Co.*, for *Home & Engall, Staines; F. FitzPayne.*

G. I. F. C.

UPMANN *v.* FORESTER.

[1882 U. 512.]

Trade-mark—Innocent Consignee—Infringement—User—Costs.

The Defendant, who was a china manufacturer, purchased abroad for his own private use a large number of cigars which were consigned to him at the docks here in cases bearing a spurious brand, purporting to be that of the Plaintiffs, who were cigar manufacturers. The Defendant was not aware that the brand was spurious, nor, except from seeing it on the invoice, that any such brand was in use.

Immediately upon the Plaintiffs issuing their writ and serving the Defendant with notice of motion for an injunction to restrain him from selling the cigars, the Defendant stated that he had no intention of selling the cigars, and offered all the relief asked for by the writ, and afterwards at the motion agreed to an undertaking in the terms of the writ, the question of costs being reserved:

Held, that the Defendant must pay all the costs of the action.

THE Defendant, who was a china manufacturer, purchased at *Tournai* in *Belgium* of a dealer there, 5000 cigars which he ordered to be consigned to him here. Such cigars were accordingly forwarded to this country packed in boxes bearing, however,

(1) Law Rep. 19 Eq. 271.

CHITTY, J. 1883 UPMANN v. FORESTER.

a spurious brand purporting to be that of the Plaintiffs, who were manufacturers and vendors of cigars.

The Plaintiffs having discovered that the boxes in question were standing to the order of the Defendant at the docks, immediately, and without any communication with the Defendant, served him with the writ in this action, by which they claimed an injunction restraining him from selling or dealing with the 5000 cigars contained in boxes bearing a colourable imitation of the Plaintiffs' registered trade-mark or brand, an account of profits, the delivery up of the boxes for destruction, and damages, and also served him with notice of motion for an injunction in terms of the writ.

The Defendant immediately wrote to the Plaintiffs disclaiming any intention of infringing their trade-mark or of selling the cigars, and at the same time expressed his willingness to have the brand removed from the boxes, and to give any information that might be required of him with reference to the purchase.

The Plaintiffs replied that they were willing to stay proceedings upon the Defendant carrying out the terms contained in his letter, and it was ultimately arranged that the motion should stand over till the trial of the action upon an undertaking without prejudice to any question as to the costs of the action.

The Plaintiffs now moved that the Defendant might be ordered to pay the costs of the action.

From the affidavit of the Defendant it appeared that when he ordered the cigars in *Belgium* he did not mention any particular brand, that although when he purchased them he received an invoice bearing the name of the Plaintiffs, he was wholly unaware there were any cigar manufacturers of their name, that he had purchased the cigars solely for his own family use, and that till after the writ in this action was served upon him, he had not even seen the cigars or the boxes in which they were packed, nor knew that there were manufacturers of cigars trading under the Plaintiffs' name.

Romer, Q.C., and *E. Cutler*, for the Plaintiffs:—

This action was brought to enforce a legal right, and the

Plaintiffs are clearly entitled to the costs: *Cooper* v. *Whittingham* (1).

The Defendant has infringed the Plaintiffs' right of exclusive user in their trade-mark, and it is wholly immaterial whether he has done so knowingly or in ignorance: *Millington* v. *Fox* (2). We were not bound to give the Defendant notice before issuing our writ: *Upmann* v. *Elkan* (3).

Colt, for the Defendant:—

There has been no intention on the part of the Defendant of doing any wrong, nor has he, I submit, done the Plaintiffs any wrong; he cannot be said to have used their trade-mark. If the Plaintiffs are proceeding under sect. 3 of the *Merchandise Marks Act*, 1862, then as there has been no intention to defraud they must fail.

But granting there has been user, there has been no damage, and what is said in *Cooper* v. *Whittingham*, that if a person commits a wrong he cannot be allowed to say he committed it innocently, does not apply to this case, because, as we say, no wrong has been done.

The Defendant is the wrong person to proceed against. The dock company, who must be taken to be the persons who distributed the goods, are the parties to proceed against: *Upmann* v. *Elkan*.

No case has been cited where an innocent purchaser has been made a Defendant for infringing a trade-mark. In *Millington* v. *Fox* the Plaintiffs had incurred a loss by the sale of the spurious goods.

Ponsardin v. *Peto* (4); *Adair* v. *Young* (5); *De Vitre* v. *Betts* (6); and the *Singer Manufacturing Company* v. *Loog* (7) were also referred to.

E. Cutler, in reply:—

The right to an injunction clearly carries the costs: *Burgess* v.

(1) 15 Ch. D. 501.
(2) 3 My. & Cr. 338.
(3) Law Rep. 12 Eq. 140; 7 Ch. 130.
(4) 33 Beav. 642.
(5) 12 Ch. D. 13.
(6) Law Rep. 6 H. L. 319.
(7) 8 App. Cas. 15.

CHITTY, J.
1883
UPMANN
v.
FORESTER.

Hills (1); *Burgess* v. *Burgess* (2); *Cooper* v. *Whittingham* (3). Someone must pay the costs, and who can be expected to pay them but the Defendant who has done the wrong?

CHITTY, J.:—

The only question I have to decide is who is to pay the costs of this action. The Plaintiffs say they are entitled to costs, and the Defendant says that even if he does not get costs he should not be called upon to pay the Plaintiffs' costs. [His Lordship here stated the facts, and continued:—] The Plaintiffs are both at Common Law and under the statute entitled to the exclusive user of their trade-mark. The Plaintiffs' case is that the Defendant has, beyond a doubt, used their trade-mark, and having knowingly or unknowingly infringed their right, must bear the consequences of having done an illegal act. The first point is: Has there been an infringement? The Defendant has imported into this country 5000 cigars in boxes bearing a spurious trade-mark. He says he was not aware of any infringement of the Plaintiffs' right until he was served with the writ, and that he never intended to sell or distribute the boxes. Although it may be the Defendant's misfortune that the boxes should bear a spurious trade-mark, yet, according to the authorities, he must be held to have committed a clear infringement of the Plaintiffs' right sufficient to entitle the Plaintiffs to an injunction for the purposes of this action. The infringement of a patent and of a trade-mark may be treated on the same footing, the question being one and the same, namely, whether the right of exclusive user has been infringed. In the case of *Adair* v. *Young* (4) the question was whether the master of a ship fitted up with pumps, which were an infringement of letters patent, was liable for the infringement, although he had nothing to do with putting the pumps on board, and had never used the pumps in British waters. It was held in the Court of Appeal that he was so liable, the ground of the decision being not that he had used the pumps in the sense of having put them in active use, but that the fact of the pumps being upon the ship constituted sufficient evidence of an

(1) 26 Beav. 244. 5 Jur. N. S. 233.
(2) 3 D. M. & G. 896. 17 Jur. 293
(3) 15 Ch. D. 501.
(4) 12 Ch. D. 13.

intention to use them, and the Court held that an injunction granted in the Court below must be sustained. In the case of *Neilson* v. *Betts* (1) there was a similar decision upon similar grounds. The Plaintiffs, therefore, in this case are entitled to an injunction, and they are also entitled to have the spurious trade-marks removed from the boxes. Now the next question is, Ought I to deprive the Plaintiffs of their right to costs because they did not give the Defendant notice before commencing their action? I do not think that this is a case where it would be just for me to deprive the Plaintiffs of their costs. A plaintiff in these cases is placed in circumstances of difficulty, because if he were to give notice there is a great probability of the defendant at once getting rid of the spurious articles before the plaintiff could interfere, and the plaintiff, therefore, by giving notice would in many instances be affording the defendant an opportunity of doing that which an injunction would have prevented. I well remember that the late Master of the Rolls, Sir *G. Jessel*, stated that he was, when at the bar, accustomed in cases like this to advise his clients not to give any notice, but to move at once. In *Upmann* v. *Elkan* (2), Lord *Hatherley*, referring to the argument that mere carriers of goods bearing a fraudulent trade-mark are guilty of no offence which could support an injunction, says: "I cannot conceive a doctrine more dangerous or mischievous or more fatal to the authority of the Court with respect to trade-marks," and the decision that the plaintiffs were not entitled to costs rested upon the fact that insomuch as the plaintiffs had given notice, and had obtained all possible redress before bill filed, they ought not to have filed a bill for an injunction. Had the plaintiffs given no notice, but forthwith commenced their suit, the decision as to costs would have been the other way. In the same case in the Court below (3), Lord *Romilly*, M.R., takes the same view; he says (4): "It has never been laid down that a plaintiff entitled to relief must, before filing a bill, apply to the defendant and ascertain previously whether he will do without suit all that is required, although such a rule might, and probably would, be a very useful one; and I remember Sir *James Wigram*

(1) Law Rep. 5 H. L. 1.
(2) Ibid. 7 Ch. 130, 132.
(3) Law Rep. 12 Eq. 140.
(4) Ibid. 12 Eq. 146.

CHITTY, J. 1883 UPMANN v. FORESTER.

regretting that no such rule prevailed. But the person at whose order the goods stand, can only then stop the further prosecution of the suit by applying to the plaintiff and consenting to do voluntarily all that he asks compulsorily. And it must always be borne in mind that in cases of injunction rapidity of action is of the greatest importance. It is, in my opinion, a mistake to say that the person at whose order the goods stand can complain if a suit is instituted against him; it arises from the misfortune of his having a dishonest correspondent." He then goes on to say: "It does not, in my opinion, make any difference whether the goods are sent to a person who does not deal in the article consigned, and whose duty is simply to distribute the goods to other persons, or whether the goods are sent to him as consignee for his own purposes. In either case they are sent to the dock to be at his disposal, and without his signature the goods cannot be disposed of." This is the short case here. The goods are at the Defendant's disposal. He was also the importer of the goods, for he bought them abroad and brought them here. I have heard the late Master of the Rolls say that if you did give notice before action and get an undertaking from the defendants, as you have the defendants' submission, you would be wrong in moving; therefore, if the plaintiff moves after notice and submission he would not get his costs. I therefore hold that it is clear on the authorities that it is not necessary in a case like the one before me to give notice. I have also held that there has been an infringement. The Plaintiffs, therefore, are clearly entitled to their costs. The result of my decision, however, will not be, as the Defendant has suggested, that every purchaser of a small parcel of spurious goods incurs a liability to pay the costs of an action in the Chancery Division for infringing a patent or trade-mark. I cannot pass over the fact that there is in the present case a large consignment of goods; 5000 cigars is rather a large order for personal consumption, and the Plaintiffs were justified in suspecting that so large a consignment was intended for distribution. The Defendant merely says that they were intended for family use. The term is not very definite and one which might easily cover a sufficiently wide distribution of the goods to establish clear evidence of user. But even if the cigars

were given away to friends and relatives and not sold, there would be a large distribution, and one calculated to do the Plaintiffs material injury, for the persons who smoked the cigars would give the Plaintiffs the credit of making an inferior article. In the case of *Cooper* v. *Whittingham* (1) it was held that the defendant must pay the costs of the action, because the importation of the spurious articles was an infringement of the plaintiffs' copyright, and an unlawful act for the consequences of which the defendant must be held liable, notwithstanding that he determined not to sell the articles as soon as he recognised that their importation was an infringement. The fact that the act is wrong by statute is immaterial; it is sufficient if the act is wrong whether it be so by statute or Common Law, or an infringement of equitable rights. As I have already said, here there had been a wrongful user prior to the commencement of the action, and the Plaintiffs, therefore, were entitled to an injunction or undertaking. They are, therefore, also entitled to costs. Although as against the Defendant the case may be a hard one, he must not on that account be excused from payment of costs. As the late Master of the Rolls said in *Cooper* v. *Whittingham*, he cannot be allowed to escape by saying, "I never intended to do wrong," and to use an observation of the same learned Judge, as there is no fund out of which successful plaintiffs can receive costs, their costs must be paid by defendants, although they may be innocent.

Counsel for Defendant asked for leave to appeal, but his Lordship declined, saying that the principle involved was covered by authority, and that the question was merely one of costs.

Solicitors: *Lumley & Lumley; H. Tyrrell*, agent for *Clarke & Hawley, Longton, Staffordshire.*

(1) 15 Ch. D. 501.

G. M.

CHITTY, J.
1883
July 2, 4.

VINE *v.* RALEIGH.

[1865 V. 3.]

Settled Estates Act, 1877 (40 & 41 *Vict. c.* 18), *ss.* 4, 13, 23, 46—*Legal Estate—No Beneficial Owner—Trustees—Persons to present Petition—Receiver.*

Where an estate is vested in trustees and there is not for the time being any beneficial owner of the rents and profits, the trustees are persons who may, under the 23rd section of the *Settled Estates Act*, 1877, apply to the Court by petition in a summary way to exercise the powers conferred by the Act.

Wolley v. *Jenkins* (1) discussed.

EDWARD WARD WALTER RALEIGH made his will, dated the 20th of April, 1864, and after appointing Sir *Edward Cholmely Dering* and *Charles Vine* his executors, and directing that all property which he might leave in trust was to be in their confidence and custody, and after providing for the payment of certain legacies and bequests, he directed that all the residue of his invested or moneyed property should eventually, together with accumulations, be invested in landed estate, and out of the interest derived on his property invested in funds or on rental of land he directed that the sum of £500 should be paid yearly to his nephew *Edward Walter Raleigh* for his life, and that the surplus over and above such annuity should from time to time during the lifetime of his nephew be expended in the purchase of additional land or in the improvement of the landed estate, and in maintaining in good habitable repair houses and tenements on the property, and that should his nephew *Edward Walter Raleigh* marry, and at his death leave a son, such son should inherit a life interest in the whole of the landed property, subject to certain conditions, and that the property under similar engagements should pass on to the lawful male heir of his nephew in succession for ever, with remainder over to his nephew *Walter Raleigh Amesbury*, and to his male heirs after him, in the event of his nephew *Edward Walter Raleigh* dying without male issue.

The testator died on the 22nd of January, 1865, and shortly

(1) 23 Beav. 53.

afterwards a suit was instituted for the administration of his estate, and a receiver was appointed.

Edward Walter Raleigh had married, and the Defendant, *W. F. C. Raleigh*, who was an infant, was his eldest son.

The trustees had with the approval of the Judge, in accordance with the terms of the will, purchased an estate near *Dartmouth*, and taken a conveyance of it upon the trusts of the will, and, there being no power of leasing in the will, the trustees were desirous of presenting a petition under the *Settled Estates Act*, 1877, to obtain the leasing powers thereby conferred, but a question had arisen whether, as a receiver had been appointed, they were now the persons entitled to present a petition under the 23rd section of that Act.

This was a summons on the part of the trustees and the receiver, which had been adjourned into Court, that they might be at liberty to present such petition for obtaining the leasing powers conferred by the Act.

Ince, Q.C., and *Byrne*, in support of the summons:—

The trustees, we submit, are under the circumstances the persons entitled to present a petition under the 23rd section of the Act. The legal estate is vested in them during the life of the testator's nephew, *Edward Walter Raleigh*, and they are entitled to receive the rents during his life, and being so entitled they can apply under this section as being entitled for the life of another.

Macnaghten, Q.C., and *Warmington*, Q.C., for the annuitant and his eldest son:—

The trustees cannot present this petition. The point has been decided by the late Master of the Rolls in *Taylor* v. *Taylor* (1), and he was affirmed by the Court of Appeal (2). Entitled to the receipt of the rents and profits means beneficially entitled: *Wolley* v. *Jenkins* (3).

Jason Smith, for *Walter Raleigh Amesbury*.

(1) Law Rep. 20 Eq. 297; S. C. 1 Ch. D. 426.
(2) 3 Ch. D. 145.
(3) 23 Beav. 53.

CHITTY, J.

1883

VINE v. RALEIGH.

CHITTY, J. :—

The only question I have to decide in this case is one on the construction of the 23rd section of the *Settled Estates Act* of 1877. That section enacts: "Any person entitled to the possession or to the receipt of the rents and profits of any settled estates for a term of years determinable on his death, or for an estate for life or any greater estate, and also any person entitled to the possession or to the receipt of the rents and profits of any settled estates as the assignee of any person who but for such assignment would be entitled to such estates for a term of years determinable with any life or for an estate for any life or any greater estate, may apply to the Court by petition in a summary way to exercise the powers conferred by this Act." In the case before me there is a will which no doubt is obscure, but it is admitted that to this extent the construction is free from ambiguity. Under the will certain estates have been purchased, and are now vested in trustees. Though the conveyance is not before me, counsel on both sides agree that the estate was conveyed to the trustees and their heirs to the uses and upon the trusts of the will. So that whether they took the fee simple or whether they only took the legal estate for a shorter period, or for any period, is left, so far as the conveyance is concerned, an open question, which can only be decided by deciding the construction of the will. Now it is never advisable to decide the construction of a will upon a question raised under the *Settled Estates Act*, and the Court usually objects to do it. But it is admitted that the legal estate is at least vested in the trustees during the life of the testator's nephew, *Edward Walter Raleigh*, and the trusts are that they should during his life pay him an annuity of £500 a year and accumulate the surplus rents, subject, of course, to the provisions of the *Thellusson Act*. There is no person, therefore, entitled to the receipts of the rents except the trustees themselves, and under the trusts which I have mentioned their obligation is to pay the annuity and accumulate the surplus, subject to the approbation of the tenant for life.

That being so, I have to ascertain whether they are persons who can present a petition to the Court under this 23rd section. This 23rd section speaks of persons entitled to the possession or receipt of the rents and profits. I think it is quite clear that a person

who is only entitled to receive during the life of another is a person who can apply under the 23rd section. Then it is said I ought to insert the words "entitled to the possession or receipt of the rents or profits for his or their own benefit," for that is what the argument comes to. I see no reason why I should insert those words in this Act of Parliament. It appears to me that I have a clear case in which there is no person entitled to the receipt of the rents except the trustees themselves. My decision will not cover the case where they are bare trustees to receive the rents and pay them over to an equitable tenant for life. There is no equitable tenant for life at present.

Now is there anything in the rest of the Act which renders it imperative that I should insert the words "beneficially entitled" or "for his own benefit?" It seems to me there is nothing in the rest of the Act, that the Act rather points to a contrary conclusion. The 4th section, which confers the jurisdiction on the Court, requires that the Court in exercising its discretion should have due regard to the interests of all persons entitled under the settlement, and under the 13th section the Court can vest in the trustees of the settlement, or in trustees to be appointed for the purpose, power of leasing. That seems to shew that the persons upon whom the Court may confer power to lease shall be persons who shall make the application, because this 23rd section does not say that the Court must act upon the application of the person who presents the petition. The application is subject to the other provisions of the Act, including besides those that I have already referred to, the 24th section with regard to concurrence. Therefore it is only this question which I have really to determine, whether the trustees can set the Court in motion for obtaining these beneficial powers which the Court will not confer unless it considers that the conferring of such powers will be for the interest of the persons entitled under the settlement. Then the 46th section is referred to, which confers on tenants for life, to put it shortly, a power to grant leases, and the language of that section was referred to in support of the argument that the trustees cannot petition, but the language of the section is different, and there are to be found in that section these words, "Either in his own right or in the right of his wife," words which

CHITTY, J. 1883 VINE v. RALEIGH.

appear to me to refer directly to persons who are entitled to receive the rents for their own benefit. Those words, I think, which are found in the 46th section and not found in the 23rd section, point to a clear distinction between the construction of the 23rd and 46th sections, and the distinction is one which is in favour of the view which I take with reference to the 23rd section. That is how the case stands to my mind on the Act of Parliament.

In *Taylor* v. *Taylor* (1) the question came before the late Master of the Rolls and went to the Court of Appeal (2), but the decision there rested in the particular circumstances of that case, and Lord Justice *James* said he did not understand the Master of the Rolls to have decided the point which is now raised before me with reference to the construction of the Act. Therefore I put that case on one side, though there are expressions on the part of the Master of the Rolls which are in conformity with the view I am now adopting.

The Defendants have referred to the case of *Wolley* v. *Jenkins* (3), and at page 60 of the report Sir *J. Romilly* is reported to have said: "Here the power is to be exercised only with the consent of the husband during his life, and after his death, or twenty-one years, with the consent of the person or persons for the time being entitled to the rents. Now this provision in the settlement, in my opinion, gives additional force to the argument against holding that the right to exercise this power is still subsisting. If it be still subsisting, who are the persons whose consents to exercise it are necessary? The settlement says they must be persons for the time being entitled to the receipt of the annual rents and profits of the hereditaments settled. This means the persons beneficially so entitled, and excludes mere trustees." That is relied upon as a general statement by Sir *John Romilly* of what he considers to be the construction of the words "persons entitled to the receipt of the rents"—that it means "beneficially." Sir *John Romilly* did not say that. He was referring to the case before him, and it is quite plain, when the power which is stated at page 54 of the report is considered, that there was no other

(1) Law Rep. 20 Eq. 297; S. C. 1 Ch. D. 426.
(2) 3 Ch. D. 145.
(3) 23 Beav. 53.

conclusion to which he could come, because the power was conferred on *Wolley* (who was the plaintiff in the case) as the surviving trustee, and that power was only to be exercised with the consent in writing of the person for the time being entitled to the receipt of the annual rents and profits of the hereditaments. It must have been therefore persons other than the trustees, because although the exact position of *Wolley* himself under the settlement is not shewn, he clearly was a trustee of this power, and he was to exercise the power with the consent of some other persons, namely, those entitled to the rents, and that must have been those beneficially entitled, otherwise the case would have no meaning.

It appears to me, therefore, that is not a statement of a general principle, or in fact a statement of law, which binds me on the present occasion. I have no doubt Sir *John Romilly* arrived at a right conclusion, but the case before me is quite different.

I hold, therefore, that the trustees are entitled to present a petition, and I give them leave to do so because under the circumstances there does appear to me to be a fair case at any rate to be considered upon the petition. I disposed of the question as to the receiver presenting the petition during the argument, but I wish to say this, that a receiver does not receive the rents and profits by virtue of any estate or title that is vested in him; he is merely the officer of the Court to collect the rents upon the title of some persons parties to the action. The receiver here is merely receiving in right of the trustees. I pointed out during the argument that the appointment of a receiver would not take away the power of the tenant for life to grant leases under the 46th section. It might hamper him in the exercise of the power to this extent, that he would have to come to the Court for leave to grant the lease, or otherwise he would be interfering with the officer of the Court.

Solicitors: *Paterson, Snow, Bloxam, & Kinder*; *A. G. Ditton; Taylor, Son, & Humbert.*

G. M.

CHITTY, J.

1883

July 4, 10.

In re Applied, SCARISBRICK [1951] 1 Ch. 622

WILSON *v.* DUGUID.

[1881 W. 1307.]

Settlement—Trust for Children—Power of Appointment—Default of Appointment—Class when to be ascertained.

By a settlement dated in May, 1833, a leasehold house was assigned to trustees upon trust for *A.* for life, and after her decease for *B.*, her husband, for life, and after the decease of the survivor of *A.* and *B.* upon trust to assign the premises unto and amongst such of the children of *A.* and *B.* then living in such manner, shares, times, and proportions as *A.* and *B.* jointly, or the survivor of them separately, should by any writing appoint, and in case there should be no such child or children, then upon trust for *C.* for life, and after his decease upon trust to assign the premises unto and amongst such of his children, and in such manner, shares, times, and proportions, as he should by any writing appoint.

A. died in 1876 without leaving issue. *B.* died in 1880. *C.* died in 1863 without having exercised the power of appointment, having had ten children, of whom three died before him, two after and before the death of *A.*, and one after the death of *A.* and before that of *B.*:—

Held, that all the children of *C.* took as tenants in common in equal shares.

Special case.

By an indenture dated the 21st of May, 1833, and made between *Robert Keeling* the elder of the one part, and *William Duguid* and *Robert Keeling* the younger of the other part, after reciting, among other things, that *Robert Keeling* the elder being desirous of making some provision for his daughter, *Sarah Duguid*, the wife of the said *William Duguid*, and also for the said *William Duguid* and *Robert Keeling* the younger, and otherwise as thereinafter mentioned, had determined to assign certain leasehold premises to which he was entitled for the residue of a term of ninety-five years from Midsummer, 1811, upon the trusts and for the purposes thereinafter mentioned, *Robert Keeling* the elder assigned the said leasehold premises to *William Duguid* and *Robert Keeling* the younger upon trust to pay the rents and profits thereof to the said *Sarah Duguid* for her life for her separate use, and from and after her decease in the lifetime of

the said *William Duguid* to pay the same to him for life, and from and after the decease of the survivor of them, the said *William Duguid* and *Sarah* his wife, upon trust to assign the said premises unto and amongst such of the children of the said *William Duguid* and *Sarah* his wife then living, in such manner, shares, times, and proportions as the said *William Duguid* and *Sarah* his wife jointly, or the survivor of them separately, should by any writing appoint, and in case there should be no such child or children, then upon trust for the said *Robert Keeling* the younger for life, and after his decease upon trust to assign the said premises unto and amongst such of his children, and in such manner, shares, times, and proportions, as he should by any writing appoint.

Sarah Duguid died in 1876 without leaving issue.

William Duguid died in March, 1880.

Robert Keeling the younger died in 1863, having been only once married, namely, in the year 1817, and having had ten children and no more.

It appeared that of such ten children three died before 1863, two after 1863 and before 1876, one after 1876 and before March, 1880, and one after March, 1880.

Robert Keeling the younger never exercised the power of appointment given him by the deed.

A question having arisen whether all the children of the said *Robert Keeling* the younger living at the date of the before mentioned settlement or born afterwards, and the representatives of such of them as had died, were entitled to the said trust premises as tenants in common, or whether only such of the children of the said *Robert Keeling* the younger as were living at the death of the said *William Duguid*, the last surviving tenant for life, were so entitled, the question was submitted to the consideration of the Court who were the persons entitled beneficially to the trust premises assigned by the deed of the 21st of May, 1833, and for what extent and interests were such persons entitled.

F. A. Lewin, for the children of *Robert Keeling* the younger, who survived *William Duguid*, the last tenant for life, and the

CHITTY, J. 1883 WILSON v. DUGUID.

representatives of deceased children who survived *William Duguid*:—

There is no gift to children, and the power of appointment is a power of selection only. The case is not the same as a gift or implied gift to children subject to a power of distribution in some one else.

The class of children to take must be ascertained at the latest possible period, that is, at the death of the last tenant for life: *Re White's Trusts* (1); *In re Phené's Trusts* (2); *Attorney-General* v. *Doyley* (3); *Pope* v. *Whitcombe* (4); *Harding* v. *Glyn* (5).

But at all events the class is to be ascertained at a period not earlier than the death of the donee of the power, who might have exercised it up to the moment of his death; if he were alive he could not now appoint to a dead child.

He also referred to *Winn* v. *Fenwick* (6), *Finch* v. *Hollingsworth* (7), *Birch* v. *Wade* (8), and *Sugden* on Powers (9).

Bonser, for the children of *Robert Keeling* the younger, who survived him and died in the lifetime of *William Duguid*:—

I adopt the latter part of Mr. *Lewin's* argument. The principle to be followed is laid down by Lord *Eldon* in *Brown* v. *Higgs* (10). The Court will to a certain extent discharge the duty in the room of the donee of the power, who might have appointed up to the time of his death but not afterwards.

H. Warlters Horne, for the children of *Robert Keeling* the younger, who died in his lifetime:—

The principle of construction is stated in *Jarman* on Wills (11). All children to whom an appointment could have been made take equally as tenants in common. As the power is not confined to appointment by will all children who came into *esse* or their representatives take. There is no indication in the settlement that the class of children is to be ascertained at any

(1) Joh. 656.
(2) Law Rep. 5 Eq. 346.
(3) 2 Eq. C. Ab. 195.
(4) 3 Mer. 689.
(5) 1 Atk. 469.
(6) 11 Beav. 438.
(7) 21 Beav. 112.
(8) 3 V. & B. 198.
(9) 8th Ed. p. 662.
(10) 8 Ves. 561.
(11) 4th Ed. vol. i. p. 552.

particular period, but on the contrary, as far as the words of the settlement shew, all the children are intended to take.

For the purpose of ascertaining the class to take in default of appointment, there is no distinction between a gift to the children of *Robert Keeling* in such shares as he shall appoint and a gift to such children of *Robert Keeling* in such shares as he shall appoint.

There is no case on all fours with this, but *Grieveson* v. *Kirsopp* (1) and *In re Jackson's Will* (2) govern this case. The general principle is stated by *Kindersley*, V.C., in *Lambert* v. *Thwaites* (3). There is an implied gift to all the children who might take, and the principle adopted by Lord *Eldon* in *Brown* v. *Higgs* (4) of performing the duty of the donee of the power, would not now be followed, at all events in a case where children only are the objects.

The rule for ascertaining the class is the same as in a direct gift: *Theobald* on Wills (5).

The old cases cited on the other side, in which "relations" were the objects of the power, do not apply, as "relations" is a vague word, and the Court might think it convenient in a case of relations to ascertain the class at the death of the tenant for life, or assume that the next of kin at the death of a testator could not have been intended.

In the more modern cases, such as *Re White's Trusts* (6) and *In re Phené's Trusts* (7), the words of the instrument require either a personal enjoyment, or that the objects of the power should be living at a deferred period. The point is put in *Lewin* on Trusts (8).

[The following cases were also referred to:—*Duke of Marlborough* v. *Godolphin* (9), *Salusbury* v. *Denton* (10), and *Burrough* v. *Philcox* (11).]

CHITTY, J.:—

The question in this case is, what children of *Robert Keeling*

(1) 2 Keen, 653.
(2) 13 Ch. D. 189.
(3) Law Rep. 2 Eq. 151.
(4) 8 Ves. 561.
(5) Page 146.
(6) Joh. 656.
(7) Law Rep. 5 Eq. 346.
(8) 7th Ed. p. 714.
(9) 2 Ves. Sen. 61.
(10) 3 K. & J. 529.
(11) 5 My. & Cr. 72,

CHITTY, J. 1883 WILSON v. DUGUID.

could take, whether all his children or those only who were living at his death, which occurred in 1863, or those only who were living at the death of *Sarah Duguid* in 1876, or those living at the death of *William Duguid*, who died in 1880.

By the settlement, after a recital that the settlor being desirous of making provision for his daughter *Sarah* and also for *William* her husband, and *Robert Keeling* the younger, had determined to assign the premises, certain leasehold premises were assigned upon trust for *Sarah* for her separate use for life, after her death to *William* her husband for his life, and after the death of the survivor upon trust to assign the premises unto such of the children of *William* and *Sarah* his wife then living, in such manner, shares, times, and proportions as the said *William Duguid* and *Sarah* his wife jointly, or the survivor of them, should by any writing appoint. The trust there is for the children living at the death of the survivor, "and in case there should be no such child or children, then upon trust for the said *Robert Keeling* the younger for his life, and after his decease upon trust to assign the said premises unto and amongst such of his children and in such manner, shares, times, and proportions as he should by any writing appoint." There is obviously a distinction between the trusts for the children of *William* and *Sarah*, and the trusts for the children of *Robert;* the trusts for the children of *William* and *Sarah* being only for those living at the death of the survivor, and those words being omitted in the trusts for *Robert Keeling* the younger.

On the true construction of this settlement, so far as relates to the children of *Robert Keeling* the younger, I hold that there is a trust for all the children of *Robert* in equal shares, subject to a power of selection and distribution exercisable by him either by deed *inter vivos* or a testamentary instrument. That appears to me to be the plain construction of the words I have read. The whole of the property is vested in trustees, there is contained a trust in the words "upon trust to assign" distinguishable from the power which is conferred upon *Robert Keeling* the younger. The objects of the power are not any of the children, though there is a power of selection and a power to exclude, not particular children of *Robert*, but all his children. There is no time limited

for the execution of the power, and it was not more or less his duty to exercise the power just before his death than it was to exercise it at any other time.

If it is necessary to resort to technical reasoning, I hold that there is a plain implication arising from the words I have read of a trust in default of appointment for all the children of *Robert*. I do not think it is necessary to refer to the other technical grounds put forward in some of the cases on the subject, namely, that there was a power which it was the duty of the trustees to exercise, and the Court could only fasten upon the power in this way, that there would be no breach of the duty which is annexed to the power until the death of the donee of the power. To apply that reasoning to this case appears to me to strain the true meaning of this instrument.

In *Brown* v. *Higgs* (1) the provision was to apply the remainder of the rent "to such children of my nephew *Samuel Brown* as my said nephew *John Brown* shall think most deserving, and that will make the best use of it, or, to the children of my nephew *William Augustus Brown*, if any such there are or shall be." That case was twice argued before the then Master of the Rolls, and he held that all the children of *Samuel Brown* and the children of his nephew *William Augustus Brown* were entitled. He said (2), "The fair construction is, that at all events the testator meant it to go to the children, and these words of appointment he used only to give a power to *John Brown* to select some and exclude the others." That point came before Lord *Eldon* on appeal, and he observed at the end of his judgment (3) that he entertained doubts on the construction of the instrument before him, and would never cease to entertain those doubts, still he affirmed the decree of the Master of the Rolls, and that decree was also affirmed in the House of Lords (4).

It appears to me that that decision is in point. The reasoning which Lord *Eldon* applies in his judgment in *Brown* v. *Higgs* (5) to *Harding* v. *Glyn* (6) ought not in my opinion to be applied to the case before me.

(1) 4 Ves. 708; 5 Ves. 495; 8 Ves. 561.
(2) 4 Ves. 719.
(3) 8 Ves. 576.
(4) 18 Ves. 192.
(5) 8 Ves. 571.
(6) 1 Atk. 469.

CHITTY, J.
1883
WILSON v. DUGUID.

In *Burrough* v. *Philcox* (1) Lord *Cottenham*, speaking of this class of cases, said (2): "These and other cases shew that when there appears a general intention in favour of a class, and a particular intention in favour of individuals of a class to be selected by another person, and the particular intention fails from that selection not being made, the Court will carry into effect the general intention in favour of the class," and upon the authority of *Brown* v. *Higgs* (3) he thought himself justified in giving effect to the intention, which appeared to him to be sufficiently apparent upon the will, of giving the property to the nephew and nieces and their children, subject to the selection and distribution of the survivor of the son and daughter. And he said (4) "they all constitute the class to take all the property as to which no such selection and distribution has been made." The case of *Duke of Marlborough* v. *Godolphin* (5), though it is a decision of Lord *Hardwicke*, would not be followed in the present day. Lord *St. Leonards* at page 592 of his book on Powers says: "There is no doubt a clear distinction between *Harding* v. *Glyn* (6) and *Duke of Marlborough* v. *Godolphin*, as in the former case the interest was wholly vested in the donee of the power, and in the latter she was expressly made tenant for life, but in both the donee had a power of selection, and the terms of the power in the latter case manifested an intention that the objects should not be disappointed." Then he quotes the words: "To his wife for life, and after her decease to be divided and distributed amongst such of his children as she should appoint. Now as the right to exclude some does not prevent the class from taking in default of appointment, it should seem that if a case in the very terms of *Duke of Marlborough* v. *Godolphin* were now to occur it would be decided that the children took as tenants in common in default of appointments, either by implication, which seems the true construction"—and with respect that is the construction I prefer to adopt on the reading of the instrument before me—"or," he adds, "because the power was coupled with a trust." That passage is quoted,

(1) 5 My. & Cr. 72.
(2) Ibid. 92.
(3) 8 Ves. 561.
(4) 5 My. & Cr. 95.
(5) 2 Ves. Sen. 61.
(6) 1 Atk. 469.

apparently with approval, by Lord *Hatherley* in his judgment in *Salusbury* v. *Denton* (1).

The principle which Vice-Chancellor *Kindersley* laid down in *Lambert* v. *Thwaites* (2) appears to me to apply to this case. There are cases which are plainly distinguishable, such for instance as *In re Phené's Trusts* (3), before Sir *John Romilly*, where on the true construction of the terms used, he considered that a personal enjoyment was intended by the persons who were the objects of the power, and that being so, he considered himself justified in holding that only those who were living at the time of the death of the donee of the power were entitled to the fund. And the case of *Re White's Trusts* (4), before Lord *Hatherley*, is a case to be referred to the same principle.

The cases on "relations" are very peculiar. It is now established that where there is power to appoint among relations so as to give the donee of the power the right of selection—the donee of the power can appoint to any relations, but in modelling the trusts to be applied in default or arising from the power being coupled with the duty, the Court has found itself under the necessity of confining the class of relations to a particular set of relations, and has adopted the rule that relations who take in default of the exercise of the power in that case are those who are next of kin according to the statute; they take as tenants in common, but not in the shares defined by the statute. Those cases are treated by Lord *St. Leonards* in a separate chapter, and seem to stand on their own special footing, and I do not consider that I am called upon to say whether I should or should not follow the case of *Attorney-General* v. *Doyley* (5). The case is shortly reported, and it is enough to say that it is a case on relations, and that in deciding the case the Master of the Rolls considered that there could be "no representation of those relations who died in his lifetime," and he held that as to the personal estate there could be no representation of those relations who died in the niece's lifetime, for before her death no part thereof vested in any of the relations, and it was contingens

(1) 3 K. & J. 536.
(2) Law Rep. 2 Eq. 155.
(3) Law Rep. 5 Eq. 346.
(4) Joh. 656.
(5) 2 Eq. C. Ab. 195.

CHITTY, J. 1883 WILSON v. DUGUID.

whether they would be entitled thereto or not. I say it is not necessary for me to say whether I should or should not follow that case, or whether it would be followed in the present day. It appears to me, for the reasons I have mentioned, to be plainly distinguishable from the case I have now to decide.

I hold, therefore, that all the children of *Robert* take as tenants in common in equal shares. I will direct the leasehold house to be sold, as it would be absurd to divide it amongst all the children as tenants in common, and the costs may be a charge on the proceeds.

Solicitors: *Lewin & Co.*, agents for *H. Wilson, Bath; Pollock & Co.*

G. M.

In re MANOR OF LOWESTOFT AND GREAT EASTERN RAILWAY COMPANY. *Ex parte* REEVE.

C. A. 1883 June 13.

Lands Clauses Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 76 [*Revised Ed. Statutes, vol. ix. p.* 645]—*Purchase-money paid into Court—Adverse Claimants—Claim of the Crown.*

A railway company under the powers of its Act gave notice to a lord of the manor to take a piece of land on the sea-shore, which he claimed as part of the waste of his manor. The purchase-money was assessed by arbitration, but an adverse claim having been made by the Crown, the company paid the purchase-money into Court under the 76th section of the *Lands Clauses Act*. The Crown filed an information against the lord of the manor claiming the land together with other land as part of the foreshore. The lord of the manor having filed a petition for payment of the purchase-money to him :—

Held (affirming the decree of *Kay*, J.), that as the Crown could not be brought before the Court under the *Lands Clauses Act* to contest the claim of the Petitioner, the petition ought to stand over till the information had been heard.

Quære as to the course which ought to have been pursued if the rival claimant had been a subject.

ON the 19th of August, 1880, and the 1st of July, 1881, the *Great Eastern Railway Company*, under the powers of their Act, with which was incorporated the *Lands Clauses Act*, 1845, served notices on Mr. *R. H. Reeve*, the lord of the manor of *Lowestoft*, in the county of *Suffolk*, to take certain pieces of land on the sea-shore which he claimed as part of his manor.

The land comprised in the notices lay to the north of the north pier of *Lowestoft Harbour*, and contained 24*a.* 1*r.* 28*p.* above high water mark, and 1*a.* 0*r.* 30*p.* between high and low water mark, but Mr. *Reeve* claimed no compensation in respect of the last-mentioned piece.

The amount of purchase-money was determined by arbitration, and the umpire assessed the value at £5373. On the 25th of July, 1882, the railway company, having had notice that the land taken was also claimed by the Crown, paid the money into Court under the 76th section of the *Lands Clauses Act* to "the

C. A. 1883 *In re* MANOR OF LOWESTOFT AND GREAT EASTERN RAILWAY CO. *Ex parte* REEVE.

account of *R. H. Reeve*, as lord of the manor, or other the party or parties interested in respect of land being part of the foreshore of *Lowestoft*, and numbered 3, 4, and 5 on the deposited plans."

The company also made an arrangement under which a like amount was deposited in joint names to satisfy the claim of the Crown if that claim should be established, and the Crown thereupon withdrew any objection to the entry of the company.

On the 28th of February, 1883, Mr. *Reeve* presented a petition asking that the sum of £5373 which had been paid into Court might be paid out to him.

On the 6th of March, 1883, the Attorney-General filed an information against Mr. *Reeve* claiming the piece of land taken by the railway company together with some other land as the property of the Crown, on the ground that the land was originally below high water mark, but had been left dry by the recession of the sea, caused by the construction of the north pier and other harbour works by the company.

The petition came on to be heard on the 9th of March, 1883, when Mr. Justice *Kay* ordered it to stand over until the information had been disposed of.

From this order the Petitioner appealed.

Kekewich, Q.C., and *Ingle Joyce*, for the Appellant:—

The order made by the Judge is irregular, and is a great hardship to us. We were in possession of the land, and the purchase-money has been paid into Court to our account. We are therefore entitled to it unless the company can shew that some one else is entitled. It is not our duty to bring the Crown before the Court. It is for the company to do that, in order that the matter may be speedily determined. We object to the decision of the case standing over indefinitely, for it may be many months before the information is brought to a decision. The information raises other questions between us and the Crown, and does not in distinct terms claim the piece of land.

Hemming, Q.C., and *Smart*, for the company, were not called on.

BAGGALLAY, L.J.:—

The answer to the question involved in this appeal appears to me to be perfectly clear.

The present Appellant at the time of the formation of a portion of the railway was, or alleged himself to be, the owner of certain land in the neighbourhood of *Lowestoft* required for the purposes of the then new railway. The 76th section of the *Lands Clauses Act Consolidation Act* provides that under certain circumstances when land is purchased or taken for the purposes of a railway the purchase-money, when the amount of it has been ascertained in the manner pointed out in the Act, may be paid into Court. That takes place where the parties refuse to convey, where the owner cannot be found, or where, the owner being found, a title is not shewn to the land to the satisfaction of the company that required it. In any one of those three cases a company has the power to pay the assessed value of the land into Court, and thereupon it acquires a right to take and use the land for the purposes of the railway. In the present case Mr. *Reeve*, the Appellant, alleges himself to have been the owner of the land so taken, but the land so taken was at some previous period of the history of *Lowestoft* a portion of the foreshore; or at any rate a claim is set up on the part of the Crown to the land so taken, on the ground of its having been formerly a portion of the foreshore, if not at the present time a portion of the foreshore.

In consequence of the assertion of the right of the Crown to the land, the title in Mr. *Reeve* was not shewn to the satisfaction of the company, and they paid the sum of £5373 into Court under the 76th section of the Act. Thereupon, as he was entitled to do, Mr. *Reeve* presented a petition to have the fund so paid into Court dealt with under the 87th section. When money has been so paid in parties can apply, and upon an application by petition in a summary way the Court may order the money to be invested in the public funds, it may order the distribution of it to the parties making claim to the money, or the Court may make such other order as the Court may think fit. If Mr. *Reeve* had been in a position to prove he had a good title to the land there would have been direct payment to him. But a difficulty arose by reason of the Crown setting up a title to the

C. A.
1883
In re MANOR OF LOWESTOFT AND GREAT EASTERN RAILWAY CO. *Ex parte* REEVE.
Baggallay, L.J.

land. If the party setting up the title had been one of the subjects of the Crown, probably permission would have been given in some form or other to serve the petition on the party, and so bring him before the Court; but it is well known that you cannot by any process under the *Lands Clauses Consolidation Act* bring the Crown into Court as a litigant to contest any claim before the Court.

It appears to have been known previously to this petition being presented that the Crown set up a claim to this land, and I gather from what has been stated that some arrangement was come to by virtue of which the Crown gave their sanction to the company entering into possession of the land they took from Mr. *Reeve*, so that there might be no dispute on that part of the case, and the land was taken possession of partly on payment of money into Court in respect of Mr. *Reeve's* claim, and partly on deposit of money to meet the claim of the Crown. These facts were all brought to the attention of the Judge when the petition was presented asking for payment to Mr. *Reeve;* and not only so, but the Court was further informed that an information had been filed by the Crown against Mr. *Reeve* and others claiming a right to the whole of the foreshore—including the particular land taken by the company of which Mr. *Reeve* asserts himself to be the sole owner. Under these circumstances I do not see what other course the learned Judge could have taken than to direct the petition to stand over until the information should have been disposed of.

Then it is said that proceedings by information are sure to be dilatory. We cannot assume that. We must assume that the proceedings on the part of the Crown will be prosecuted with due and proper diligence. If there should be any delay, especially any delay caused by the conduct of the railway company, possibly some application might be made with reference to the purchase-money; but unless there is reason to suppose the information will not be brought to a fair hearing in a reasonable time, I do not see how the Court could deal with the matter, except in the way in which it has been dealt with. If the money were paid to the Petitioner it might be eventually determined in the information that he had no title to it whatever. Therefore it is convenient

to postpone the hearing of the petition until such time as the information shall have been heard, and I think this appeal ought to fail.

COTTON, L.J.:—

I quite agree. It was hardly contended that the Petitioner was at the present moment entitled to have the money paid out, but it is said that he is entitled at least to have the question between himself and the Crown decided under the *Lands Clauses Act*. I cannot accede to that view. Undoubtedly in ordinary cases where the adverse claimant is one who can be dealt with under the *Lands Clauses Act*, and the objection is taken by the railway company, the Court would direct the petition to be served on that adverse claimant in order to see whether the matter could be decided on the petition. But here we are dealing with a claimant who cannot be brought in under the *Lands Clauses Act*. That is practically conceded by the Petitioner, because he did not insist that the matter might stand over in order that he might serve the Crown, but he simply desired to go on and fight the question out, not with the Crown, but with the railway company. In my opinion that would not be right. The railway company are quite willing to pay the money to whoever is entitled to the land, and it is the person who is entitled to the land who ought to have the money. Nor ought the railway company to be compelled in any way to pay the money twice over, when all they have to do is to pay the person entitled for the land which they have taken. In my opinion that is no possible reason for making the railway company fight the battle of the Crown in the absence of the Crown, and to take upon themselves the burden of shewing that the Crown, who cannot be brought here, is entitled to this land as against the Petitioner.

It is said that in the information the Petitioner would stand in a less advantageous position than he would occupy under the *Lands Clauses Act*. That is simply saying that the claim is made by one who cannot be brought in under the *Lands Clauses Act*, and if as against ordinary claimants the *Lands Clauses Act* gives the Petitioner an advantage, it does not give him

C. A.
1883
In re MANOR OF LOWESTOFT AND GREAT EASTERN RAILWAY CO. *Ex parte* REEVE.
Cotton, L.J.

an advantage as against the adverse claimant in the present case. It was suggested by Mr. *Joyce* that the information does not distinctly raise the question respecting the piece of land, and that it raises other questions independent of this claim. I think that it does raise the question of the title to the piece of land. It may be that it involves other questions, but that is no reason for throwing upon the railway company the burden which would be thrown upon them by causing them to litigate the question on behalf of the Crown, with the risk of having to pay the money twice over. I think the course taken was a reasonable course. I by no means say it would be unreasonable in all cases to direct the petition to stand over even where the claimant is a subject who could be brought in under the *Lands Clauses Act*. It might well be that where an action was brought by an adverse claimant, the Court might say, "This is a matter which cannot be properly dealt with under the *Lands Clauses Act*, let the petition stand over until the litigation is determined in the ordinary way between the parties to the action." In the present case it is not necessary to determine that point, and I merely say this in order that it may not be supposed that where the adverse claimant is a subject the matter ought necessarily to be disposed of on a petition under the Act.

Solicitors: *Gregory, Rowcliffes, & Co.; W. F. Fearn.*

M. W.

In re CHAPEL HOUSE COLLIERY COMPANY.

C. A. 1883 June 27, 28.

Winding-up—Creditor's Petition—Right of Creditors to a Winding-up Order ex debito justitiæ—Companies Act, 1862, *s.* 91 [*Revised Ed. Statutes, vol. xiv., p.* 222].

Although as a general rule an unpaid creditor of a company which cannot pay its debts is entitled to a winding-up order, that order will not be made when it is shewn that the petitioning creditor cannot gain anything by a winding-up order, and, *à fortiori*, it will not be made under those circumstances if the other creditors oppose it.

In re Uruguay Central and Hygueritas Railway Company of Monte Video (1) approved.

The 91st section of the *Companies Act*, 1862, is not confined to cases where a winding-up order has been made, but applies also where a petition for winding-up is before the Court.

The colliery belonging to a colliery company was subject to a large mortgage payable by instalments, and all its assets had been assigned to trustees upon trust for its debenture holders, who had no present right of action against the company for the principal of their debts, which was not payable till 1885, but only for the arrears of interest, which were considerable. The colliery was not worth so much as the mortgage money, but it was worked at a profit, and the instalments of the mortgage debt were being paid, but nothing was left to pay interest to the debenture holders. There appeared, however, to be reason to think that if the business were continued, and the coal trade improved, there would be something for the debenture holders. The colliery was leasehold and liable to forfeiture if the company was wound up. A holder of debentures to a small amount presented a petition to wind up the company, the debt on the footing of which he petitioned being the arrears of interest on his debentures. A vast majority of the other debenture holders opposed the petition, and none of them supported it. *Kay*, J., thought the case not a proper one for making a winding-up order, but directed the petition to stand over for six months:—

Held, on appeal, that the petition ought to be dismissed at once.

THIS company was formed in 1873 for the purpose of working certain coal mines in *Lancashire* called the *Chapel House and Crop Collieries*, which were demised to the company on the 30th of July, 1874, subject to a proviso for re-entry on divers events, one of which was the event of the company being wound up. The articles of association contained powers for increasing the capital of the company by the issue of preference shares.

(1) 11 Ch. D. 372.

C. A. 1883 *In re* Chapel House Colliery Company.

By indenture dated the 31st of July, 1874, the company, in consideration of £65,000 advanced to them by *Edward Smith*, assigned to *J. Loughran*, by the direction of *Smith*, the collieries with all buildings, erections, railways, fixed and locomotive engines, fixed and loose machinery, fixtures, &c., and chattels of what nature or kind soever which were or should be erected upon or used in connection with the premises, subject to redemption on payment of the £65,000 and interest in manner therein mentioned. The deed contained a covenant by *Smith* not to call in the £65,000 if repaid by instalments as therein mentioned. The deed contained a proviso that, so long as the principal money owing upon it should exceed £50,000, or at any time afterwards if default should be made in payment of the principal or any interest contrary to the proviso for redemption and payment by instalments therein mentioned, it should be lawful for *Loughran* to take possession of the collieries and work them.

In June, 1875, a resolution was duly passed authorizing the raising of £40,000 by the issue of debentures, and that sum was accordingly raised by the issue of 4000 debentures of £10 each. By each debenture the company promised to pay £10 on the 1st of July, 1885, to the registered holder with interest in the meantime at £7 10*s.* per cent. per annum by half-yearly payments.

By an indenture dated the 1st of December, 1875, reciting the resolution for the issue of the debentures, the company declared that it would stand possessed of the leaseholds upon the trusts thereinafter declared. The company then assigned to two trustees all such of the railways, engines, machinery, goods, and chattels which, at any time during the security, should be erected, brought upon, or used in connection with the leasehold premises as were not demised by the lease but to which the company were (subject to any option of purchase given to the lessor) absolutely entitled, and all other the property of the company of any description except the unpaid capital of the company and the premises demised by the lease, to hold the premises thereby assigned to the trustees subject to any right of the lessors and to the mortgage. It was then declared that the company and the trustees should respectively stand possessed of the demised premises and the chattel premises upon trust that until default should be made

in payment of some principal money secured by the debentures, or in the payment of some interest for the period of three calendar months after such principal money or interest should become due according to the terms of the debentures, and three months should have elapsed after notice of such three months' default should have been given to the trustees by the holder of any of the debentures, the company should be allowed to remain in possession. On the expiration of three months from such notice of default as above mentioned, unless the sum in respect of which default had been made had been paid, the trustees were, as soon as they considered it expedient so to do, to take possession of the chattels and sell them, and apply the proceeds (after payment of the mortgage) in payment of the moneys due on all the debentures rateably. A power of distress was given to the trustees in the event of interest to the amount of £1000 on the debentures being in arrear for thirty days, and they were directed to apply the proceeds of the distress in discharging the arrears of interest. The company agreed that if the trustees should take possession of the chattels under the above power the company would carry on its business under the inspection of the trustees, and that the profits should be paid to the account of the trustees, who, after providing for expenses and the interest on the mortgage debt, should accumulate the surplus, and as often as the accumulated fund should be sufficient to pay off £1000 of debentures, should apply it in paying off debentures to that amount, to be drawn by lot. The deed contained a proviso that so long as the company should carry on the business under the inspection of the trustees as aforesaid, and duly pay to them the net proceeds, the trustees should not after taking possession of the chattels sell them under the preceding trust, but permit the whole of them, or such part as should be required for the proper working of the collieries, to be employed therein by the trustees under such inspection as aforesaid. It was further provided that upon possession of the chattels being taken by the trustees the company should execute to them a registered bill of sale of the chattels. And the company declared that they would, subject to the provisions thereinbefore contained, so far as the same could consistently with the memorandum and articles of association be

C. A. 1883 — *In re* Chapel House Colliery Company.

carried into effect, and subject to the mortgage and to the provisions of the lease, stand possessed of the demised premises upon trust for securing payment of the debentures; and the company charged the demised premises with the amount of the debenture loan and interest, and declared that it should be raised by the trustees out of the demised premises or the produce thereof, subject to the mortgage and the provisions of the lease, and be distributed among the debenture holders rateably; and it was declared that in the event of the sale of the demised premises, either in the winding-up of the company or otherwise, the debenture holders should be paid in preference to other creditors.

The Rev. *Miles Atkinson* was the holder of ten debentures in his own right, and of twenty as executor to his brother. On the 5th of May, 1883, he commenced an action against the company to recover £112 10*s.*, being five years' interest on the debentures. On the writ being served, the secretary, on the 9th, wrote to Mr. *Atkinson* a letter which was in part as follows: "Permit me to say that you will obtain nothing by the pushing forward of this action, the property being at the present time in the hands of its mortgagees, who in the event of hostile action will undoubtedly take possession altogether, and the company would immediately go into liquidation. As the chairman of the last meeting explained, the property is being worked by the mortgagees, and the balance of profit, which now amounts to £3000 or £4000 per annum, goes to the reduction of the mortgage, and when this is entirely cleared off the property will again come into the hands of the shareholders. Should trade remain in its present state it will necessarily take a long time before the mortgage can be liquidated, but should an improvement take place in the coal trade, it would be matter of but a very short time. I think in the above I have written you sufficient to shew that it will be to your interest, also in that of all other debenture and shareholders, to permit the company to go on as at present, hoping that the future may bring us some return. The proceeding with your action merely means the ruin of the company and the throwing away of the chance there may be of you or your brother debenture-holders obtaining any return."

Mr. *Atkinson*, on the 15th of May, presented a petition to wind

up the company, alleging that the company was unable to pay its debts, and that its assets were insufficient to meet its liabilities.

It was shewn in evidence that *Loughran* had for some time been in possession under the mortgage deed, and was still working the colliery at a profit; the mortgage debt having been reduced from £65,000 to £49,000 by means of the profits.

On the 30th of May a meeting of shareholders was held for the purpose of considering the petition. This meeting was attended by persons holding a majority of the shares in the company, and they passed a unanimous resolution requesting the directors to take steps to oppose the petition.

On the same day a meeting of debenture-holders was held, which had been convened by notice, to consider the petition. It was attended by debenture-holders to the amount of £25,980, who passed a unanimous resolution that a winding-up order would be prejudicial to the debenture-holders, and requested the trustees for the debenture-holders to appear and oppose the petition.

Mr. Justice *Kay* considered that a winding-up order ought not to be made, as it could not be of any possible advantage either to the Petitioner or to any one else, but, having regard to *In re Great Western (Forest of Dean) Coal Consumers Company* (1), his Lordship considered that the petition ought not to be dismissed but ordered to stand over, and he directed it to stand over for six months. The company and the body of debenture-holders appealed. The appeal came on to be heard on the 27th of June, 1883.

Rigby, Q.C., and *Grosvenor Woods*, for the Appellants:—

A winding-up order is opposed to the wish substantially of all the parties interested, and cannot be a benefit to any one. The petition therefore ought to be at once dismissed. The case of *In re Uruguay Central and Hygueritas Railway Company of Monte Video* (2) is in point, and the observations on p. 383 apply to the present case. Mr. Justice *Kay* accepted the law as there laid down, but went on the *Great Western (Forest of Dean)*

(1) 21 Ch. D. 769. (2) 11 Ch. D. 372.

C. A. 1883 *In re* Chapel House Colliery Company.

Coal Consumers Company (1), and ordered the petition to stand over. There is no reason here for ordering it to stand over; its pendency will paralyse the company and take away the chance of the debenture-holders getting anything. In the *Great Western Case* the object of ordering it to stand over was to keep a control on the petitioners, who held securities which would have enabled them to stop the company. Here there is no such reason. The debenture-holders are substantially the owners, and their wishes are to be consulted: *Companies Act*, 1862, s. 91.

Hastings, Q.C., and *Greenwood*, *contrà*:—

The Court of Appeal will not readily interfere with the discretion of the Judge below in ordering a petition to stand over. There is no case in which a petition by a *bonâ fide* creditor for winding up an insolvent company has ever been dismissed. The case of *St. Thomas's Dock Company* (2) is on all fours with the present, and there the petition was directed to stand over. In the present case the Petitioner is a creditor for the interest, and can sue the company. In the *Uruguay Case* (3) the creditor could not, he could only put the trustees in motion for the benefit of himself and the other debenture-holders *pari passu*, which entirely distinguishes that case from the present. A creditor is entitled *ex debito justitiæ* to a winding-up order when he cannot get paid: *Bowes* v. *Hope Life Insurance Company* (4). A creditor is entitled to equitable execution, and the Court cannot refuse it. *In re Western of Canada Oil Lands and Works Company* (5), the principle is recognised that a creditor is entitled *ex debito justitiæ* to a winding-up order, though not necessarily to an immediate one: *In re Brighton Hotel Company* (6). If the petition is dismissed at all the company should be ordered to pay the costs, which can be done under sect. 86 of the Act. But the Court will not take away from a diligent creditor who brings his case within the Act the benefit of his diligence: *In re London Suburban Bank* (7); *In re West Hartlepool Ironworks Company* (8).

(1) 21 Ch. D. 769.
(2) 2 Ch. D. 116.
(3) 11 Ch. D. 372.
(4) 11 H. L. C. 389.
(5) Law Rep. 17 Eq. 1.
(6) Ibid. 6 Eq. 339.
(7) Ibid. 6 Ch. 641.
(8) Ibid. 10 Ch. 618.

Grosvenor Woods was only called upon to reply as to costs, and referred to the letter of the 9th of May as giving the Petitioner, before presenting the petition, full information of the circumstances, which shewed the utter inutility of a winding-up.

BAGGALLAY, L.J. :—

This is an appeal from an order of Mr. Justice *Kay*, directing a petition for the winding-up of a company to stand over for six months. The petition is by a debenture-holder, and his views are not adopted by the other debenture-holders. The bulk of the debenture-holders and the company join in the present appeal asking to have the petition dismissed.

The Petitioner holds in his own right ten debentures of £10 each, and twenty more as executor, making in all £300. The sense of the body of debenture-holders was shewn in this way: a meeting was summoned, and the debenture-holders who attended it, holding nearly £26,000 out of the £40,000 of debentures issued, passed a unanimous resolution to oppose the winding-up. The petition is also opposed by the unsecured creditors. The state of things is this—the colliery is subject to a large mortgage, and it appears clearly that if it were now sold it would not realize enough to pay the mortgage, and there would be nothing for the debenture-holders. The Petitioner relies on the common expression that a creditor whose debt is undisputed and who cannot obtain payment is entitled *ex debito justitiæ* to a winding-up order. This is founded on the dictum of Lord *Cranworth* in *Bowes* v. *Hope Life Insurance Company* (1), where his Lordship says: "It is not a discretionary matter with the Court when a debt is established and not satisfied, to say whether the company shall be wound up or not; that is to say, if there be a valid debt established, valid both at law and in equity. One does not like to say positively that no case could occur in which it would be right to refuse it; but ordinarily speaking it is the duty of the Court to direct the winding-up," and Lord *Selborne* in *In re Western of Canada Oil Lands and Works Company* (2), expresses his agreement with that doctrine. This proposition is expressed in very general terms, but it has subsequently been almost

(1) 11 H. L. C. 389, 402. (2) Law Rep. 17 Eq. 1, 6.

C. A. 1883 *In re* CHAPEL HOUSE COLLIERY COMPANY. Baggallay, L.J.

universally considered that these remarks only apply as between the petitioning creditor and the company, and that where the interest of the body of creditors comes in, the Court will have regard to the 91st section of the *Companies Act*, 1862. In the case of the *Brighton Hotel Company* (1), Vice-Chancellor *Malins* held, that the general expressions of Lord *Cranworth* must be qualified in cases to which that section applied, and in *In re Western of Canada Oil Lands and Works Company* (2) it was distinctly held that the section is applicable not only in proceedings under a winding-up order, but whenever a winding-up petition is before the Court. Here the opinion of the bondholders has been taken, and the Petitioner stands alone in desiring a winding-up. He presented his petition after receiving the letter of the 9th of May, which made him aware of the state of the company and its affairs. If, then, the Court is to pay attention to the wishes of the creditors what ought to be done? The Petitioner says if an order is not made at once let the petition stand over; and several cases were cited in which this was done, but all of them are very different from the present in their circumstances. In the case of *St. Thomas's Dock Company* (3) the company desired a postponement, and it was ordered on undertakings being given. In *In re Western of Canada Oil Lands and Works Company* there was a *primâ facie* case for winding-up, but there was a prospect of money coming in from *Canada*, which might make it unnecessary. The petition was ordered to stand over to see whether money would come in, and when the petition came on again, no money having arrived, a winding-up order was made. The decision of Mr. Justice *Kay*, in the present case, seems to have been given in deference to that in *Great Western (Forest of Dean) Coal Consumers Company* (4), where *Fry*, J., ordered the petition to stand over. Mr. Justice *Fry* there said (5): "In my judgment the Court ought to consider not merely the number of the opposing creditors and the value of their debts, but ought to have some regard to the reasons which they adduce for the conclusion at which they have arrived."

(1) Law Rep. 6 Eq. 339.
(2) Ibid. 17 Eq. 1.
(3) 2 Ch. D. 116.
(4) 21 Ch. D. 769.
(5) 21 Ch. D. 773, 774.

C. A. 1883 *In re* CHAPEL HOUSE COLLIERY COMPANY. Baggallay, L.J.

Then again: "Ought I to dismiss the petition at once, or ought I to delay my decision and order the petition to stand over? I think the latter is the better course for the creditors and for the company also." I agree with the view that these cases must be dealt with according to their special circumstances. Another case has been referred to, which enunciates a doctrine to which I fully assent, and which has now for the first time to be considered by the Court of Appeal, viz., *In re Uruguay Central and Hygueritas Railway Company of Monte Video* (1). The head-note of that case gives the rule, to which I assent, and I need not go into the judgment: "As a general rule an unpaid creditor of a company is entitled to a winding-up order *ex debito justitiæ;* but that rule is subject to exceptions: *e.g.*, where all the other creditors oppose the petition, and it appears that the petitioning creditor will not be in a better position by obtaining a winding-up order." I do not say that there may not be other cases in which the Court would dismiss the petition, but where the circumstances there mentioned by the Master of the Rolls concur, I think that it ought to be dismissed. I am satisfied that in the present case the Petitioner would not be in a better position by obtaining a winding-up order. It is urged for the Respondent that a postponement will do no harm; but it appears to me that it would do very great harm, for it would paralyze the company. We find that the mortgage debt is being gradually reduced, and if the company goes on and trade improves, there may be something for the debenture-holders. Then, as it has been observed by Lord Justice *Cotton*, there is a power to increase the capital by the issue of preference stock. It may possibly turn out that this power can be exercised with advantage; but it will be impossible to exercise it if a winding-up petition, an order on which would relate back, is kept hanging over the company.

If the creditor had not known before he presented his petition how utterly useless a winding-up order would be, I should not have been disposed to order him to pay costs, but as matters stand, I think the petition ought to be dismissed with costs.

COTTON, L.J.:—

This is a winding-up petition by a creditor under peculiar

(1) 11 Ch. D. 372.

C. A. 1883 *In re* Chapel House Colliery Company. Cotton, L.J.

circumstances. The debt in respect of which he presents the petition consists of interest on debentures, of which he is the holder. All the other debenture-holders, so far as they have expressed their wishes, are opposed to a winding-up. When I say all, I do not forget that the debenture-holders were not all present at the meeting, but the holders of debentures to the amount of £25,980 out of the total of £40,000 were present, and were unanimous against winding-up. The state of the assets is this—they are all included in a mortgage, or in a security given to trustees for the debenture-holders, so that if a winding-up order were made there is nothing of which the liquidator could take possession. This is most material in considering the propriety of making a winding-up order. No attempt is made to shew that there is a scrap of property which can come to the liquidator, even enough to pay his costs. What then ought to be done? The Judge in the Court below ordered the petition to stand over, but that is most prejudicial to the company, for everything the company could do would be liable to be defeated by a winding-up order which would relate back to the presentation of the petition, and the company would therefore be paralyzed. But it is said that a creditor who cannot get paid is entitled to a winding-up order *ex debito justitiæ*, and that the ordering the petition to stand over is only a sort of compromise giving him less than he has a right to claim. But what is the meaning of that maxim? I think it is this. A winding-up order is the means of having the assets of a company applied in payment of its debts, and therefore a creditor generally, where the company is insolvent, is entitled to the order as a matter of right. But this assumes that a winding-up order will help him to obtain payment, and in a case where there are no assets which the liquidator can receive the reason fails. I put it to the Respondents whether the Court is bound to make a winding-up order, though it cannot result in anything but costs. They reply in the affirmative. I entirely dissent, and am of opinion that where there are no assets which can be got in under a winding-up, an order for winding-up ought not to be made. The rule that a creditor of an insolvent company is entitled as of right to a winding-up order is only laid down by Lord *Cranworth* as a general, not a universal, rule, and the observations of Lord *Selborne* in the *Western*

of Canada Company's Case (1) support the view that the maxim in fact amounts to this—that if there are assets it is as a general rule the right of the creditors to have them made available by a winding-up order. The observations of the late Master of the Rolls in *In re St. Thomas's Dock Company* (2) deal with the maxim as having the meaning which I attribute to it. The very ordering petitions of this kind to stand over is in itself an adoption to a limited extent of the principle I have mentioned. In my opinion a petition ought not to be presented when it is clear that it cannot produce any result in the way of payment of debts. The wishes of the debenture-holders are not to be disregarded, but the main ground on which I rest in the present case is that nothing can be got for anybody by a winding-up order. I do not mean to say that in no case ought a winding-up order to be made where there are no assets to be distributed under it, because a winding-up order is the only way of putting an end to a company, but that is a matter which does not concern a creditor. The petition must be dismissed, and as it was presented with full knowledge of all the circumstances, it must be dismissed with costs.

BOWEN, L.J.:—

I am of the same opinion. The case may be decided on the simple principle that no one can be entitled to ask for a winding-up order when it is impossible that he should obtain anything by it. Here, if a winding-up order were made, there are no assets on which it could take effect. The Petitioner contends that he is entitled to an order because a creditor is entitled *ex debito justitiæ* to a winding-up order, which is in fact giving him equitable execution. He may be so entitled if there is anything on which the equitable execution can take effect, but not when it is clearly shewn that there is nothing. In all the cases in which the expression has been used that a creditor is entitled *ex debito justitiæ* to a winding-up order, I think that it is used in a special sense. I do not think that it was ever meant to lay down that the object of the Act was to give a creditor a right to a winding-up order when it was plain that he could derive no

(1) Law Rep. 17 Eq. 1. (2) 2 Ch. D. 116.

C. A. 1883 *In re* Chapel House Colliery Company. Bowen, L.J.

benefit from it. The power of winding-up was given for the benefit of a particular class, and is entrusted to the Court for their benefit. The words of the Act are in form permissive, but it is not a mere matter of discretion whether the Court will order a company to be wound up or not—it is the duty of the Court to give the creditor that relief which the Legislature intended to give him. But it does not follow from this that if the machinery provided by the Act cannot possibly avail for the purpose of paying debts, the creditor is still entitled to put that machinery in motion for his own delectation. It is an abuse of the procedure to set it in motion when it is shewn that it cannot in any degree accomplish the purpose for which it was established by the Legislature. Apart then from sect. 91 a creditor has no absolute right to a winding-up order *ex debito justitiæ*—no right to put the machinery in motion for nothing. But sect. 91 enables the Court to have regard to the wishes of the other creditors, and here an overwhelming majority of creditors has given its voice against winding-up. This furnishes a second ground, but to my mind the first is sufficient. As regards the ordering the petition to stand over, I think that a petition ought only to be allowed to stand over in furtherance of a legitimate proceeding, and I do not think that the presentation of this petition was a legitimate proceeding. It ought not, in my opinion, to be left hanging over the company for a single hour.

Solicitors for Appellants: *Snell, Son & Greenip.*
Solicitor for Petitioning Creditor: *A. Calkin Lewis.*

H. C. J.

In re ORDE.

C. A. 1883 June 23; July 7.

Lunatic—Deceased Lunatic—Appointment of New Trustee after his Death—Trustee Extension Act, 1852 (15 & 16 *Vict. c.* 55), *s.* 9 [*Revised Ed. Statutes, vol. xi., p.* 328]—*Affidavit—Description of Deponent as a "Gentleman."*

The Court, sitting in lunacy, has power under the 9th section of the *Trustee Extension Act*, 1852, to appoint new trustees of the will of a deceased lunatic, where the trustees appointed by the lunatic have died in his lifetime, for the purpose of getting rid of the funds standing in Court to the credit of the lunacy.

It is not sufficient to describe a person making an affidavit of the fitness of a new trustee merely as a "gentleman."

HARRY WILLIAM ORDE made his will dated the 18th of June, 1839, and thereby gave all his real and personal estate to *W. Dickson* and *T. Thorp*, upon trust for his brother, *L. S. Orde*, for life with remainder to his children.

On the 3rd of February, 1865, *H. W. Orde* was found a lunatic by inquisition, and *L. S. Orde* was appointed committee of his estate.

The lunatic had both real and personal estate. His real estate was sold in the lunacy, and the proceeds invested in consols to the account of "The Proceeds of Real Estate." All the personal estate had also been converted and invested in consols.

The two trustees, *W. Dickson* and *T. Thorp*, both died in the lifetime of the testator.

The lunatic died on the 30th of January, 1883, and administration with the will annexed was granted to *L. S. Orde*.

A petition was now presented by *L. S. Orde* and his children, in lunacy and in the Chancery Division, praying for the appointment of two new trustees of the will, and for transfer to such trustees of the fund representing the real estate, and for transfer to *L. S. Orde* of the fund representing the personal estate of the lunatic.

Barber, Q.C., and *Manisty*, for the petitioners:—

It has been suggested that the Court, sitting in lunacy, has no power to appoint new trustees of the lunatic's will, the lunatic

C. A. 1883 *In re* ORDE.

being dead; but we submit that the Court has jurisdiction to do so under the 9th and 10th sections of the *Trustee Extension Act*, 1852. The 31st section of the *Conveyancing Act*, 1881, does not appear to be applicable, as the trustees both died before the testator.

BAGGALLAY, L.J. :—

We are very unwilling to travel beyond our jurisdiction, but we think that when the lunatic is dead it is the duty of the Court to get rid of his estate, and we cannot do this in the present case without appointing new trustees under his will. We will, therefore, make an order according to the prayer of the petition, except that as one of the trustees named is a member of the firm of solicitors acting for the petitioners, it will not be regular to appoint him a trustee. The petition must stand over to name some one in his place.

COTTON and BOWEN, L.JJ., concurred.

July 7. The petition was mentioned again in order to obtain the approval of the Court to the proposed new trustee. The affidavit of fitness was made by a person who was described merely as a "gentleman."

COTTON, L.J. :—

The Court cannot accept affidavits of fitness by persons who are merely described as "gentlemen," without stating their occupation. In future, if the other members of the Court concur, I shall not receive any such affidavit nor allow the costs of it.

BOWEN, L.J., concurred.

Solicitors: *Warrens*, agents for *W. & W. Dickson, Alnwick.*

M. W.

BUTCHER *v.* POOLER.

C. A.
1882
V.-C. B.
Nov. 3.
C. A.
1883
July 9.

[1876 B. 91.]

Partnership Suit—Costs of unsuccessful Claim—Appeal for Costs—Rules of Court, 1875, *Order* LV., *r.* 1.

By articles of partnership between three partners, on the death of any partner the survivors were entitled to take his share at a valuation. One of the partners having died, his executrix brought her action to have it declared that the goodwill was to be included in the valuation, and to have the value of the deceased partner's share in the assets ascertained. A decree was made declaring that the goodwill must be valued as part of the assets, and directing accounts. The Chief Clerk made his general certificate, finding (*inter alia*) that two specified leaseholds belonging to the partnership were of no value. The Plaintiff took out a summons to vary the certificate by estimating these leaseholds as worth a considerable sum. The summons was adjourned into Court, and *Bacon*, V.-C., refused to vary the certificate, but ordered the costs of both parties to be paid out of the estate. The Defendants appealed:—

Held, that the case did not come within the rule in *Foster* v. *Great Western Railway Company* (1) that the Court cannot make a successful defendant pay the costs of a plaintiff who has wholly failed; but that it was within the discretion of the Court to order all costs reasonably incurred in ascertaining the fund to be paid out of the fund, and that an appeal would not lie.

CHARLES BUTCHER carried on business in partnership with the Defendants *Pooler* and *Jones* under articles by which, in the event of the death of a partner, the survivors were entitled to take to his share at a valuation. The partners were entitled to the net profits in equal shares. *Butcher* died in July, 1875, appointing the Plaintiff his executrix. In 1876 she commenced this action to have it declared that the goodwill of the business was an asset of the partnership, and to have the accounts taken and the value of *Charles Butcher's* share ascertained.

On the 28th of November, 1876, a decree was made declaring that the goodwill ought to be treated as part of the assets, and directing an account of the assets, including the goodwill, and an account of the partnership debts and liabilities at *Butcher's* decease.

(1) 8 Q. B. D. 25, 515.

C. A. 1883 BUTCHER v. POOLER.

The Chief Clerk made his certificate, dated the 4th of May, 1882, and in the schedule of assets he set down the goodwill at £3661 4*s.*, and entered two leasehold properties occupied by the partnership as being of no value.

The Plaintiff took out a summons to vary the certificate by fixing the value of the goodwill at £4657 10*s.*, and estimating the leaseholds as worth respectively £3247 and £6696, being the values at which eminent surveyors employed by the Plaintiff had valued them. The summons was adjourned into Court, and on the 7th of July, 1882, Vice-Chancellor *Bacon* declined to vary the certificate, but ordered the costs of both parties in Chambers and in Court to be paid out of the partnership estate.

On the 3rd of November, 1882, the cause came on for further consideration, and the question as to the costs of the above proceedings was again raised.

Millar, Q.C., and *P. B. Abraham*, for the Plaintiff.

Horton Smith, Q.C., and *Northmore Lawrence*, for the Defendants.

BACON, V.C.:—

There is no question that the general rule in taking partnership accounts is that the costs of ascertaining the true state of the accounts are to be borne by the partnership estate. No doubt in an ordinary case a man who makes an unfounded claim and fails to establish it must pay the costs, but I cannot conceive that this has any application to partnership accounts. In ascertaining the value of the assets the view taken by one party may turn out to be unfounded, but the matter has to be investigated, and it does not follow that the bringing forward such a view was unreasonable.

The leasehold property in question was part of the partnership estate. It was alleged by the Plaintiff to be of considerable value. On the other hand, the Defendants said it was worth nothing. The Plaintiff took out a summons to vary the finding that this item of property was worth nothing and failed. I am then asked to apply what is undoubtedly the rule in an ordinary suit and make him pay the costs of that contention in which he has failed.

But it cannot be separated from the partnership account. The Court has to ascertain what was the value of the assets at a particular time, and the costs are costs of administering the estate. If there had been a dispute whether an outstanding debt was good or irrecoverable that would require a separate investigation, but the expenses of that investigation would be part of the expenses of taking the partnership accounts. The value of the leaseholds was an open item in the partnership accounts until this investigation had taken place, and the costs of it must be borne by the partnership estate.

The order on further consideration accordingly treated the costs of the summons to vary as part of the general costs which were ordered to be paid out of the estate. The Defendants appealed from the direction of the 7th of July, 1882, as to costs, and from so much of the order on further consideration as gave effect to it. The appeal was heard on the 9th of July, 1883.

Horton Smith, Q.C., and *Northmore Lawrence*, for the Appellants:—

The giving the costs of this unsuccessful application out of the fund makes us bear two-thirds of them.

[COTTON, L.J.—You must shew that they are not costs within the discretion of the Court.]

There is no jurisdiction to make a successful party pay costs: *Johnstone* v. *Cox* (1).

[COTTON, L.J.:—Is it not the ordinary rule to give the costs of a partnership suit out of the estate?]

The old rule was to give no costs up to the hearing: *Hawkins* v. *Parsons* (2); *Seton* on Decrees (3); but the rule has latterly been introduced of paying the costs out of the assets: *Hamer* v. *Giles* (4).

[BOWEN, L.J.:—Is not this case within Order LV., rule 1.]

We submit not. Regard must be had to sect. 49 of the Act; these are not costs within the discretion of the Court, there being

(1) 19 Ch. D. 17.
(2) 10 W. R. 377.
(3) 4th Ed. p. 1206.
(4) 11 Ch. D. 945.

C. A. 1883 BUTCHER v. POOLER.

a settled rule of practice as to them. Every order is appealable unless there is a statutory enactment or a rule of Court shewing that it is not: *Jones* v. *Chennell* (1). There may be an appeal whenever a question of principle is involved: *In re Rio Grande do Sul Steamship Company* (2).

[BRETT, M.R.:—The *Judicature Act* and Gen. Ord. LV., rule 1, overruled a number of statutory provisions as to costs in common law actions, and surely a rule of practice in Chancery does not stand on a higher ground.]

An appeal was allowed on the ground of such a rule of practice in *Farrow* v. *Austin* (3), *Turner* v. *Hancock* (4), and *In re Silver Valley Mines* (5). So where a question of principle was involved: *Johnstone* v. *Cox* (6); *Cooper* v. *Vesey* (7).

[BOWEN, L.J., referred to *Foster* v. *Great Western Railway Company* (8).]

Where one man's fund is taken to pay another man's costs that is not a discretion which cannot be appealed from.

[COTTON, L.J.:—Is not a partnership suit in substance an administration suit in which the costs ought to come out of the fund apart from questions as to misconduct?]

Millar, Q.C., and *P. B. Abraham*, for the Plaintiff.

[BRETT, M.R.:—Your difficulty is this. You wholly failed on the inquiry, and the Defendants are made to pay two-thirds of your costs.]

We went into Chambers on accounts and inquiries. The value of two leaseholds had to be ascertained. We employed one of the most eminent firms of land agents in *London*, and they valued them at more than £10,000. The Chief Clerk was embarrassed, and with much difficulty came to a conclusion that the leaseholds were worth nothing. The summons to vary was adjourned to be heard in Court, and the Judge did not find enough to enable him

(1) 8 Ch. D. 492, 502.
(2) 5 Ch. D. 282.
(3) 18 Ch. D. 58.
(4) 20 Ch. D. 303.
(5) 21 Ch. D. 381.
(6) 19 Ch. D. 17.
(7) 20 Ch. D. 611.
(8) 8 Q. B. D. 25, 515.

to say that the Chief Clerk was wrong. *Hamer* v. *Giles* (1) establishes the rule that in the absence of misconduct the costs of a partnership suit will be paid out of the assets. Our contention that the leaseholds were valuable was a *bonâ fide* and reasonable one, being founded on the advice of most eminent valuers, and the costs of it must be considered as part of the ordinary cost of working out the decree.

BRETT, M.R.:—

In this case, on the death of a partner, an action in the Chancery Division was instituted, in which a decree was made to administer the partnership estate. In the course of the administration a dispute as to facts arose, which was first dealt with by the Chief Clerk and then adjourned into Court, and the decision was adverse to the Plaintiff. The Vice-Chancellor decided against her, but ordered the costs of the inquiry to come out of the estate. The appeal is from that order as to the costs. The question is whether we have jurisdiction to hear the appeal, or whether it was a discretionary order as to costs from which an appeal will not lie. It is contended for the Respondent that the general rule is that the costs of such a suit should be paid out of the estate unless there is a case of misconduct; but even if there were misconduct, I think the Court clearly would have a discretion to say that it was not sufficient to lead the Court to refuse to order the costs to be paid out of the estate. Now under the *Judicature Act* when costs are in the discretion of the Court there cannot be any appeal. Can this case be brought within any of the exceptions from that rule? The case which appears most favourable to the Appellants is *Foster* v. *Great Western Railway Company* (2). The Court of Appeal there held that where the Plaintiff in an action wholly failed, an order that the Defendant should pay the costs was not an order which the Court, though having discretion as to costs, could legally make. Does this case come within that rule? In the first place the Plaintiff here has not wholly failed, the decree decided an important point in her favour, and she has only failed on this particular inquiry. As, however, she failed entirely on that particular inquiry, does

(1) 11 Ch. D. 942.

(2) 8 Q. B. D. 25, 515.

C. A. 1883 BUTCHER v. POOLER. Brett, M.R.

not an order giving the costs of that inquiry out of the estate come within the principle of *Foster* v. *Great Western Railway Company* (1), is it not an order giving the unsuccessful party costs out of a fund which belongs to the successful party? My answer is that in the Chancery Division where a fund is being administered it is not correct to say that the fund belongs to one or the other of the parties, or that it belongs to the parties in certain shares. It is not correct here to say that one-third of the fund belongs to the Plaintiff, and two-thirds to the Defendants; the whole fund belongs to them both, and it has to be determined in the cause what share belongs to each. Before that can be done it must be determined what the fund is, and these costs were incurred in ascertaining what the fund was. They are part of the costs of the administration, and it cannot therefore be said that in point of principle or of fact the case comes within *Foster* v. *Great Western Railway Company*. I should further say, that that was an extreme case, and I should not be inclined to apply the rule to any but an extreme case. The argument for the Appellants in the present case, if sound, would lead to this, that if any one point was decided in favour of any party and the costs of all parties relating to that point were ordered out of the fund, there might be an appeal as to the costs. I am of opinion that we have no jurisdiction to entertain the appeal.

COTTON, L.J.:—

I am of the same opinion. This is not a case where the Plaintiff has entirely failed. The Plaintiff came to have it ascertained what the partners were entitled to on a dissolution. She raised a question as to the value of the assets, on which she failed. The question was raised for the purpose of ascertaining the amount of the fund to be divided. The costs of such an inquiry are costs as to which the Court of Chancery always exercised a discretion. If the point was improperly raised the Court made the party raising it pay the costs; but if there was no impropriety, then it was the practice of the Court to allow the costs of both parties out of the estate. In the ordinary case neither party is entitled to anything till the amount of the estate has been ascertained, and the costs

(1) 8 Q. B. D. 25, 515.

of ascertaining is provided for; and it is in the discretion of the Court to say how the costs of the inquiries requisite for ascertaining it are to be borne. *Johnstone* v. *Cox* (1) was pressed upon us. In that case, where the costs of the second mortgagee were ordered to be paid out of the fund, it was held that an appeal would lie; but that was on the ground that a mortgagee's security extends to his costs as well as to principal and interest. I am of opinion that the present is an appeal from an order as to costs which were in the discretion of the Court below.

BOWEN, L.J.:—

I am of the same opinion. The first question is whether these are costs within Order LV., rule 1. The Appellants are not within the exception there mentioned, for this is not an order depriving them of a right to costs out of any fund to which they would be entitled according to the old rules of Courts of Equity. Are they then within the rule? The Appellants say that the Vice-Chancellor's order goes beyond what the rule warrants. They say that here is a fund, one-third of which belongs to the Plaintiff and two-thirds to them; that the Plaintiff has brought forward an unfounded claim, and that they will have to pay two-thirds of the expenses occasioned by it. But it is necessary for the Appellants to shew that money has been taken to pay costs out of a fund which cannot be lawfully appropriated to payment of them. Their argument is that, as in *Johnstone* v. *Cox*, the Court will not allow a fund to which one person is entitled to be applied in payment of the costs of another; and *Foster* v. *Great Western Railway Company* (2) may be referred to as illustrating the point they make, it having been held in that case that to make a successful defendant pay the costs of an unsuccessful plaintiff was not an order as to costs within the discretion of the Court, but an order as to something outside the jurisdiction of the Court. That was an extreme case, and it was there held to be beyond the meaning of Order LV. that the Court should be enabled to make a successful defendant pay the costs of harassing him with an unfounded litigation. I am of opinion that that case does not apply here. In the first place this is not an order for payment of costs out of a fund which cannot be lawfully appropriated to

(1) 19 Ch. D. 17.

(2) 8 Q. B. D. 25, 515.

C. A. 1883 BUTCHER v. POOLER. Bowen, L.J.

payment of costs. The fund has not been divided, and the division of it is a matter as to which the Court has to decide. I also rely upon this, that the dispute arises in a suit for the administration of the assets of a partnership, and in which the Court has to ascertain the fund. This dispute arose in the course of ascertaining the fund, and a claim may be reasonable though it turns out to be ill-founded. If it is reasonable, whether owing to obscurity in the articles of partnership or to any other circumstances, it is reasonable that the expenses occasioned by it should be paid out of the estate. The Court must decide whether it was a reasonable claim to bring forward, and an order for payment of the costs of it out of the estate is a discretionary order as to costs within Order LV.; and is not appealable.

Solicitor for Plaintiff: *W. Mills Roche.*
Solicitor for Defendants: *C. J. Mander.*

H. C. J.

C. A. 1883 *July* 11.

In re WATMOUGH. SERGENSON *v.* BELOE.

[1883 W. 75.]

*Court of Chancery of County Palatine of Lancaster—Service out of Jurisdiction—*17 & 18 *Vict. c.* 82, *s.* 8 [*Revised Ed. Statutes vol. xii. p.* 95].

Where the sole Defendant to an action commenced in the Chancery Court of the County Palatine of *Lancaster* is resident out of the jurisdiction of that Court, leave to serve the writ of summons upon him out of the jurisdiction, if it can be granted at all (as to which *quære*), will only be granted under very special circumstances.

THIS was an action in the Chancery Court of the County Palatine of *Lancaster* against *H. C. Beloe,* as sole Defendant, for an account of all property come to his hands as the trustee of several wills. The Defendant resided at *Leamington,* out of the jurisdiction of the *Lancaster* Court. On the 12th of June, 1883, the Plaintiffs applied to the Court of Appeal for leave to serve the Defendant at *Leamington,* or elsewhere in *England,* and leave was given, the Plaintiffs undertaking to consent to a transfer of the action to the High Court if the Defendant

should desire it. The writ was accordingly served, and the Defendant having put in an appearance, now applied to have the action transferred to the High Court.

Bardswell, for the application.

Clare, for the Plaintiffs, said that he could not oppose the application, but that as the Court of Appeal in giving the leave for service had expressed doubt as to the propriety of making an order for service on a sole Defendant out of the jurisdiction of the *Lancaster* Court, though such orders had repeatedly been made of late years, it would be a great advantage to the practitioners in the Court of the County Palatine if the Court of Appeal would lay down a rule on the subject.

COTTON, L.J.:—

I was one of the Judges who gave leave to serve the writ of summons in the present case. I should not have concurred in giving such leave had it not been for the fact that such orders had previously been made by the Court of Appeal, and as we doubted the propriety of making the order, we imposed on the Plaintiffs the condition that they should undertake to consent to a transfer to the High Court if the Defendant desired it. I am by no means clear that the statute 17 & 18 Vict. c. 82, s. 8, authorizes service out of the jurisdiction on a sole Defendant, and assuming that it does, I am of opinion that leave to effect such service ought only to be given under very special circumstances.

BRETT, M.R.:—

I agree that if an order for service on a sole defendant out of the jurisdiction of the Palatine Court can be made at all, it ought only to be made under very special circumstances.

BOWEN, L.J., concurred.

Solicitor for Defendant: *W. W. Wynne.*
Solicitor for Plaintiffs: *E. W. Owles.*

H. C. J.

C. A.
1883
July 14.

PARKER *v.* FIRST AVENUE HOTEL COMPANY.

[1882 P. 563.]

Light—Obstruction—Angle of 45°*—Injunction—Form of Judgment.*

There is no conclusion of law that a building will not obstruct the light coming to a window if it permits the light to fall on the window at an angle of not less than 45° from the vertical. The question of the amount of obstruction is always a question of fact which depends on the evidence in each case. Therefore a Plaintiff whose ancient light is obstructed is entitled to a judgment in general terms, without referring to the angle of incidence of the light, unless there is some special evidence justifying the insertion of such a clause.

Hackett v. *Baiss* (1) considered.

THE Plaintiff was the lessee of a dwelling-house No. 40 on the north side of *High Holborn*, except the ground floor, which was used as a shop. The Plaintiff carried on the business of a photographer, and used the uppermost floor for taking portraits by photography.

In the uppermost floor were two windows looking westward. This floor was higher than the adjoining house on the west—No. 41—and the Plaintiff had a prescriptive right to unimpeded light through these windows.

The Defendant company purchased the adjoining house—No. 41—and pulled it down, and proposed to build a large hotel on the site. The Plaintiff ascertained, by inspection of their plans, that the proposed building would materially affect his lights, the eastern wall being intended to be carried up much higher than the Plaintiff's windows, and within about three feet of them. After some correspondence with the Defendants the Plaintiff brought the present action, asking for an injunction to restrain the Defendants from erecting any new building so as to obstruct the light coming to his windows.

The windows were about the middle of the west wall of the Plaintiff's room, there being a considerable space of blank wall to the north and south of them. The Defendants proposed to

(1) Law Rep. 20 Eq. 494.

make a sloping roof at an angle of 45° in front of the windows, but to build up a straight wall opposite the blank wall to the north and south of them.

The trial of the action took place in the county of *Middlesex* before Mr. Justice *North* without a jury, on the 22nd and 23rd of November, 1882.

On the 7th of December his Lordship gave judgment for an injunction in the following form: "To restrain the Defendants from raising their new buildings in front of the Plaintiff's ancient windows to a greater height than three feet above the sill of those windows; but this injunction is not to prevent the Defendants from putting on a sloping roof of greater height so long as the angle of incidence of light over such sloping roof, to the centre part of the Plaintiff's said windows, be not less than 45° from the perpendicular above the point of incidence, or to prevent the Defendants from raising their new buildings on the north and south sides of the Plaintiff's ancient windows to a greater height than three feet above the said sill, so long as the Defendants do not thereby injure, darken, or obstruct the ancient windows of the Plaintiff as the same were previously enjoyed."

The Plaintiff now moved, by way of appeal, that the judgment might be varied so that the injunction should be in general terms to restrain the Defendants from erecting any building in such a manner as to darken or obstruct any of the ancient lights on the Plaintiff's premises as they were previously enjoyed.

Before the notice of appeal was served the Defendants proceeded with their works and built up the wall to the south-west of the Plaintiff's premises, and also built the sloping roof at the angle sanctioned by the judgment.

Finlay, Q.C., and *Colt*, for the Appellant:—

We object to the form of the judgment which allows the Defendants to make a sloping roof at an angle of 45°, whether such roof should interfere with our right or not. The Judge followed the form of the decree in *Hackett* v. *Baiss* (1). He treated it as a conclusion of law that a roof at an angle of 45° from the centre of our windows would not interfere with our light. But *Hackett*

(1) Law Rep. 20 Eq. 494.

C. A. 1883 PARKER v. FIRST AVENUE HOTEL COMPANY.

v. *Baiss* (1) laid down no such rule. It is always a question of fact whether any particular building interferes with light, and there was no evidence at the trial as to the effect of a roof at that or at any other angle. Therefore we are entitled to have the injunction in general terms; and the Defendants must build their walls and roof at their own risk: *Field* v. *Debenham* (2); *Attorney-General* v. *Nichol* (3); *Yates* v. *Jack* (4).

Matthews, Q.C., and *Beddall*, for the Defendants:—

We admit that it is not a rule of law that a roof at an angle of 45° does not interfere with the light coming to a window, nor did the Judge treat it as such. But it has been so often proved that a roof at that angle does not impede the light, that the Courts treat it as *primâ facie* evidence that there will be no obstruction: *City of London Brewery Company* v. *Tennant* (5). It is true that no evidence was adduced upon the subject, because both sides assumed it, but it was quite within the jurisdiction of the Judge to insert the clause into the judgment as an expression of his opinion as to the rights of the parties. We have built the roof in accordance with the judgment, and no objection was made by the Plaintiff at the time.

COTTON, L.J.:—

This is an appeal raising an important point between the parties, and in some respects it is a question of general importance.

There was a suit to restrain the Defendants from erecting a large building close to a room or building occupied for photographic purposes by the Plaintiff, and it was pretty clear that that building, if erected according to the only plans which were in existence at the time when the action was commenced and when it was heard, would have materially interfered with the light to which the Plaintiff was entitled in respect of some ancient windows which he had on the west side of his building. The Court was of that opinion, and granted an injunction in favour of the Plaintiff, but it was in a special form, that is to say,

(1) Law Rep. 20 Eq. 494.
(2) 2 Ch. D. 165.
(3) 16 Ves. 338.
(4) Law Rep. 1 Ch. 295.
(5) Law Rep. 9 Ch. 212.

it granted an injunction to restrain the Defendants from raising their new buildings more than three feet above the sill of the Plaintiff's windows for which he was entitled to protection. But then it went on in this way, "That this injunction is not to prevent the Defendants from putting up a sloping roof of greater height so long as the angle of incidence of light over such sloping roof to the centre part of the Plaintiff's said windows be not less than 45° from the perpendicular above the point of incidence, or to prevent the Defendants from raising their new building on the north and south sides of the Plaintiff's ancient windows to a greater height than three feet above the said sill, so long as the Defendants do not thereby injure, darken, or obstruct the ancient windows of the Plaintiff, as the same were previously enjoyed."

Now, as a matter of construction, "so that they do not thereby injure, darken, or obstruct," applies, as both sides concede, to the buildings on the north and south sides of the Plaintiff's ancient windows, and does not apply to the erection of the sloping roof; and they have not been restrained from raising that sloping roof, in the event of its darkening the Plaintiff's lights. In fact the order is an adjudication that a roof at that angle would not interfere with the Plaintiff's lights. The question which has been argued before us is whether it was right to make an injunction in that form.

Now it was said that the learned Judge followed a decision of the late Master of the Rolls in *Hackett* v. *Baiss* (1). It may be, that having regard to the pleadings in that case and the contention between the parties, the Master of the Rolls took it as an admitted fact between the parties that an erection at that particular angle would not in any way interfere substantially with the light for which the plaintiff sought protection: and if that was so, then in my opinion he was quite right in limiting the injunction in the way in which he did limit it, because when a matter is ripe for decision between the parties on a motion for injunction, it is quite right for the Court, and it is its duty, so to mould its injunction, that having regard to the case made and the evidence before the Court, it may decide that which is ripe

(1) Law Rep. 20 Eq. 494.

C. A. 1883 PARKER v. FIRST AVENUE HOTEL COMPANY. Cotton, L.J.

for decision and prevent the question being raised *de novo*, which it might be on a motion to commit, if the injunction were simply granted in the ordinary form of an injunction to restrain from building or doing something else so as to interfere with the plaintiff's rights. We may take an instance of a little different kind, where there is an action to restrain the breach of covenant. There may be cases where it is a great question whether a particular thing is or is not a breach of the covenant, and the Court adjudicates on the question in issue between the parties. Then in my opinion the injunction ought not to be in general terms to restrain the defendant from committing any breach of covenant, because the defendant has threatened to break the covenant, but should contain an adjudication on the particular thing which is said to be a breach of the covenant, so to restrain him by injunction from doing that particular thing, and in that way to limit the generality of the injunction. And so with the question of lights, if on the evidence it appears that a particular construction of the building will, and that something less than that will not, interfere with the rights of the parties, it is quite right so to limit the injunction as to prevent that particular thing being done.

But it appears here that this is a matter which was not in contest between the parties on the evidence as a matter of fact, and therefore in my opinion the learned Judge was wrong in taking this form of order, which he seems to have adopted not because it was a proper form of order with reference to the contest between the parties in the particular case, but as following a form of order given by the Master of the Rolls in a case where probably the facts or the admissions of the parties or their contest did enable him to adjudicate and deal with it in that way.

That being so, it will be the strict course to grant the injunction in general terms. But as I understand the Appellant, all that he desires is to restrict the liberty given to the Defendants to depart from that injunction by saying they are not to do it so as by the northern or southern buildings alone, or by those buildings in conjunction with or in combination with the sloping roof, to interfere with the lights of the Plaintiff. Therefore having regard to this, that we should not desire to modify this injunction

more than is necessary, we are of opinion the proper form of modifying the order will be this: To vary the injunction which was granted by the learned Judge by substituting for "thereby" in the latter part of the exception the following words: "So long as the Defendants do not by the buildings on the north and south side of the Plaintiff's ancient windows alone, or by those buildings in combination or in conjunction with the sloping roof to be erected under the liberty hereinbefore granted, injure, darken, or obstruct the ancient windows of the Plaintiff, as the same were enjoyed previously to the taking down by the Defendants of the buildings formerly standing." That in our opinion (I am speaking for the rest of the Court) is the form of order which, if the old form is departed from, ought to have been granted in this case.

But then we are in this difficulty, that we are told that since the hearing before the learned Judge and since this judgment the buildings have gone on. We are of opinion that the Plaintiff has done nothing which disentitles him on coming here to get the judgment varied if it was not in accordance with what he was entitled to. Buildings have been erected since which he alleges are in violation of the injunction as we think it ought to be varied. We are not in a position to decide that, though probably if both parties had consented we might in order to save further litigation have settled the matter as between the parties. But as that is alleged, and there is apparently some doubt on the fact, we think it would be right to grant a fresh injunction in these terms: "And it being alleged that the Defendants have since the judgment of the 7th of December erected buildings which are in violation of the judgment as now varied, grant an injunction to restrain the Defendants from continuing or permitting to remain any buildings erected in violation of the judgment as now varied." That will not compel them to take down anything, unless they are satisfied that something they have done is in violation of the injunction as now varied; that is to say, if they are satisfied that their south wall, either alone or in combination with the sloping roof, does interfere with the Plaintiff's lights, they will not wait for a motion to commit, but will so modify their building as to prevent an obstruction. But if

C. A. 1883 PARKER v. FIRST AVENUE HOTEL COMPANY. Cotton, L.J.

they object, then on a motion to commit the matter will have to be decided whether the building on the south (because that is really the substantial thing) either alone or in combination with the sloping roof does substantially injure or interfere with the lights of the Plaintiff. It would not be a matter for which sequestration could issue, or upon which there could be a committal, because the order contained no words restraining the Defendants from doing what they have done, but if the buildings continue hereafter, if they are an interference with the Plaintiff's lights, the Defendants will be liable to a sequestration or such other process as to the Court may seem just in order to settle the question between the parties and to enforce obedience to our order.

Then we have to consider how the costs are to be dealt with. Under ordinary circumstances, of course, we should deal with the costs at once. But it occurs to the Court there may be some doubt whether what has been done was a substantial injury to the Plaintiff—whether in substance the order did not give him what he is entitled to, and whether the buildings now substantially do interfere with the Plaintiff's lights under the order as varied, and what therefore we think will be the better course is this, that if any motion for sequestration or otherwise to enforce the judgment as varied is made by the Plaintiff, the costs of this appeal should be dealt with by the Judge on that application, but if no such application is made then there should be liberty to apply to this Court to deal with the costs.

I ought to add this; it is said (and I think it will be found to be so) that Mr. Justice *North* put the order in this particular form following a precedent. That would seem as if it was on the assumption that that was the proper form of order on this ground—that, as a matter of law or as a necessary inference of fact, no building not exceeding the limit which he described of 45° could substantially interfere with any ancient lights opposite which the buildings were erected. I have said before, and the Master of the Rolls has said before, and other Judges have said before, that if there is any such idea, it is erroneous. It cannot possibly be that as a matter of law or matter of necessary inference buildings at that angle will not cause any interference

with lights. The Lord Chancellor said in one case that where there was a large open street and the buildings complained of on the other side of that street do not form a worse angle, that looked very much as if there would be no interference. But the inference only arises in such a case as that. Each case must depend on the fact whether the defendant's buildings do interfere with the plaintiff's lights. As I pointed out in *Ecclesiastical Commissioners for England* v. *Kino* (1), the idea seems to have arisen from a reference to the *Building Act*, which was not intended to deal with questions of light but to determine what was a reasonable width of street having regard to the height of the houses on both sides, and as regards air and everything else. But if it is considered that there is any law or any inference of fact that this angle is sufficient, the sooner that idea is got rid of the better. It must be a question of fact in each case.

BRETT, M.R., and BOWEN, L.J., concurred.

Solicitors: *Eady; Ingram, Harrison, & Ingram.*

M. W.

MACLEOD *v.* JONES.

[1883 M. 2128.]

Mortgage—Injunction to restrain Sale by Mortgagee—Payment of Money into Court—Mortgagee in fiduciary Position—Solicitor and Client.

The ordinary rule that the Court will not grant an interlocutory injunction restraining a mortgagee from exercising his power of sale except on the terms of the mortgagor paying into Court the sum sworn by the mortgagee to be due for principal, interest, and costs, does not apply to a case where the mortgagee at the time of taking the mortgage was the solicitor of the mortgagor. In such a case the Court will look to all the circumstances of the case, and will make such order as will save the mortgagor from oppression without injuring the security of the mortgagee.

The Plaintiff was a lady who was entitled to a life interest in leasehold property which she had mortgaged to various persons. The Defendant acted as her solicitor, and with her sanction in order to release her from embarrassment bought up several of the incumbrances with his own money and took a transfer of them to himself; having previously taken a mortgage

(1) 14 Ch. D. 213.

C. A.
1883
MACLEOD
v.
JONES.

of the life interest to secure his past costs and the costs which he might incur in paying off the incumbrances. Afterwards the Plaintiff discharged the Defendant, and employed another solicitor, who applied to the Defendant for information respecting the securities transferred. The Defendant refused to give this information unless the payment of what was due to him was guaranteed, and threatened to proceed to a sale of the property. The Plaintiff then brought an action to impeach the securities and to restrain the sale of the property, and moved for an injunction till the hearing:—

Held, that considering all the circumstances, an injunction ought to be granted, on the Plaintiff paying into Court such a sum as the Court considered would cover the amount actually advanced by the Defendant, and amending the writ so as to make it a simple action for redemption and injunction:—

THE Plaintiff was entitled under the will of her father to a life interest in certain property to her separate use. The property consisted principally of seven seventeenth shares of a hotel in *London* called *Law's Hotel*, and £1100 invested in railway debentures.

In 1873 the suit of *Macleod* v. *Bonson* was commenced for the administration of her father's estate. Messrs. *George Wyatt Digby* and *George Edward Digby*, his son, carried on business in partnership as solicitors in *Malden*, where the Plaintiff lived, and Mr. *George Wyatt Digby* also practised as a solicitor separately in *London*. Messrs. *Digby* were the Plaintiff's solicitors, and advanced considerable sums to her on the security of her life interest in the above-mentioned property.

At that time Mr. *A. Jones*, the Defendant in the present action, was an articled clerk in Mr. *Wyatt Digby's* office, and in 1877 became a partner with him.

The Plaintiff also raised money from several other persons on the security of her life interest, in some cases at very high interest. The income of her life interest under her father's will was carried to the separate account of herself and her incumbrancers in *Macleod* v. *Bonson*, and applications in that suit were from time to time made for payment of money to the various incumbrancers.

The Defendant *Jones* advised the Plaintiff to find some friend to buy up the incumbrances and to consolidate them, and according to his statement she requested him to do this himself. On

the 10th of August, 1880, the Plaintiff executed a mortgage to the Defendant of her life interest for securing to him a sum of costs then due to him, and the costs of paying off the incumbrances, a list of which was given in the mortgage deed.

The Defendant *Jones* then bought up some of the incumbrances and took transfers of them to himself.

The amount so paid by the Defendant amounted to about £1326, but the whole sum due on the mortgage for principal, interest, and costs, was estimated by him as between £3500 and £4000. The lease of the hotel had only about eight years to run. The Defendant held also policies of insurance on the Plaintiff's life for £1800.

There was a sum of about £700 standing to the account of the Plaintiff and her incumbrancers in the suit of *Macleod* v. *Bonson*, and between £200 and £300 in the hands of the receiver. The share of the profits of the hotel was about £650 per annum.

In June, 1883, the Plaintiff instructed Mr. *R. B. Toller* to represent her in the suit of *Macleod* v. *Bonson* and generally to investigate her affairs. He accordingly wrote to the Defendant *Jones* for information as to the securities transferred to him, and urged him to declare himself a trustee of the securities for the Plaintiff.

On the 16th of June, 1883, the Defendant wrote to the Plaintiff's solicitor a letter in which he said:—

"Dear Sir,—Referring to our interviews yesterday and previously, we now write you as promised. The amount due to us for principal, interest, and costs, amount to between £3500 and £4000, but without prejudice we are willing to accept £2000 if paid down at once. We must distinctly decline to hand over any papers until our costs are paid, and we cannot answer any further inquiries unless you send us your personal undertaking to pay our cost of so doing. Several solicitors have at various times made similar inquiries to yours, but all with one result. If you are prepared to pay us our principal, interest, and costs, or such amount as we may agree to accept in respect of them, we are willing to give you every assistance. We have further to add that some time having now elapsed since your first communication it is our intention to proceed to realise our securities

C. A. 1883 MACLEOD v. JONES.

after twelve on Monday, unless in the meantime we receive your personal undertaking to pay us the £2000, or amount owing to us, within a short date. On your giving us that undertaking we will of course furnish you with a full detailed account.

"Yours faithfully,

"*Alfred Jones & Co.*"

After some further correspondence the Defendant wrote to the Plaintiff's solicitor as follows:—

"33, *John Street, Bedford Row,*

"June 18, 1883.

"Dear Sir,—You surely do not expect us to go to the trouble and waste of time of explaining to you the full particulars and position of the complicated matters to enable you to judge if it is worth your while to take them up. We have already done more than could reasonably be expected of us in this direction. We have nothing to add to ours of the 16th, which we are now acting upon. We cannot waste any further time over this very unprofitable matter, and you must kindly take this letter as an intimation that we cannot see you again on the subject, and that our correspondence is closed.

"Yours faithfully,

"*A. Jones & Co.*"

On the receipt of this letter, Mrs. *Macleod* issued a writ against *A. Jones* and *G. W. Digby* claiming that the mortgages held by the Defendants on the Plaintiff's interest in the property now being administered in the action *Macleod* v. *Bonson* might be declared void on the ground of fraud and undue influence, or that the Defendants might be declared trustees of them for the Plaintiff, and an injunction to restrain the Defendants from parting with or enforcing the mortgages and other securities.

On the 20th of June the Defendant *Jones* gave notice to the Plaintiff's solicitor that he intended to sell the Plaintiff's interest under her father's will on or about the 15th of July.

On the 12th of July the Plaintiff moved for an injunction before Mr. Justice *North*, but his Lordship refused the application, making the costs costs in the action.

From this decision the Plaintiff appealed.

The Defendant *Digby* did not appear on the appeal.

W. W. Karslake, Q.C., and *Medd*, for the Appellant:—

We admit that in an ordinary action by a mortgagor against a mortgagee no such order as we ask for would be made except on the terms of the mortgagor paying into Court all principal, interest, and costs which the Defendant claims, but this is not an ordinary action. The Defendant was in a fiduciary position towards the Plaintiff; he bought up the incumbrances at her request, and as her solicitor, and holds them as trustee for her. No doubt some money is owing to him in respect of what he has advanced, but the mortgage of August 1880 was invalid so far as it professed to secure future costs, and he has refused to give any information respecting the securities unless the payment of what he claims is guaranteed to him. Under these circumstances the Court will not permit him to take advantage of his power as mortgagee in so oppressive a way against his former client. The sale of the life interest would be ruin to the Plaintiff, for it would be sold at a great disadvantage.

We are willing to amend the writ by striking out *Digby's* name as Defendant and confining the relief prayed against *Jones* to the ordinary relief in a redemption suit, with an injunction against his selling the property and dealing with the securities.

Everitt, Q.C., and *C. C. Tucker*, for the Defendant:—

It is true that the Defendant was the Plaintiff's solicitor when he bought up the securities, but he was not her solicitor when the money was borrowed, and he had been discharged from that employment by the Plaintiff before he threatened to enforce these securities, and no fiduciary relation now exists between them. There is therefore nothing to distinguish this case from the case of an ordinary mortgage. A mortgagee does not lose his rights because he is a solicitor. There is nothing oppressive in the conduct of the Defendant; he is contented to abate much of his just demand. The security is a very hazardous one; the life interest may cease at any moment, and the lease of the hotel is at the best a very uncertain property. The Defendant had no intention to refuse information, but he found it necessary to

C. A. 1883

MACLEOD v. JONES.

discourage inquiries unless he was satisfied that they were made with a real intention of settling his claim.

BRETT, M.R.:—

I always find considerable difficulty in cases which come before us in this Division of the Court of Appeal in getting at what are the real facts of the case. In this respect I think we are entitled to be treated as if we were a jury, and no man can ask a jury to come to a decision on facts unless he states them clearly to them and makes them understand them by a clear and succinct statement of what from the evidence he undertakes to prove. But I find that when the facts are brought before this Division of the Court of Appeal we are indulged with paragraphs of affidavits which it is suggested are not answered in other affidavits, and with a cloud of apparently circumstantial statements all round the facts, but which never will lay clearly the facts before the Court.

Now in this case I take it we have with much pain and labour arrived at this state of things. There is a lady who is interested in some hotel at the back of the *Junior United Service Club* who had a certain solicitor, and being a lady in business in such a place and such a position she naturally had to borrow money. Well, she did borrow money either from her solicitor or from other people, and gave mortgages on her business to secure that money. Now this was done at the time when this gentleman, Mr. *Jones*, against whom this application is made, was not her solicitor, and as I understand had nothing to do with these loans or these mortgages—at all events nothing into which there is any occasion to inquire at the present time. But Mr. *Jones* afterwards became the solicitor to this lady—after she was involved in all these mortgages, and then by one means or another he proceeds to endeavour to settle her affairs. One mode of settling her affairs (inasmuch as the said mortgages were out in the hands of various persons) was to get them, if possible, into the hands of one person, whereupon it is said that the lady requested Mr. *Jones* to get these mortgages all into his own hands. Now you may talk to me for hours if you please, and try to persuade me that she asked him to get the mortgages for the

purpose of simplifying matters and settling her affairs—I do not believe a word of it. It was he who advised her that the best way of settling her affairs and simplifying matters was that he should buy up those mortgages. I dare say if he did advise this he did so with perfectly good intention. He did buy the mortgages, having advised her that this should be done. At the time he was her solicitor it was his duty to advise her as to the best means of settling her affairs. He was advising her as to the best means of settling her affairs, and he advised her to let him buy the mortgages. I do not say that such a thing is illegal, I do not say that it is dishonest, I do not say that it is improper; but I do say it is exceedingly dangerous, because what is the effect of the transaction? He, the person whose duty it is to settle her affairs—to settle them in the best way for her—puts himself into the position of being one of her creditors; the solicitor who is to advise her makes himself her creditor, and I think that is a very dangerous position. That is the position into which he has put himself on this occasion.

While he is in that position, having purchased these mortgages, the lady becomes dissatisfied and discharges him from being her solicitor. Well, that is perhaps calculated to make him very angry. Whereupon what does he do? He almost immediately afterwards says, and it shews the danger of his position: "If you do not pay me, not what I have paid for the mortgages, but the amount of these mortgages and all my costs, I, the mortgagee of your business and of all that can earn you a livelihood, will sell and realise my security." Supposing she had submitted to that without taking further advice, her property would have been illegally and extortionately sold for more than he is entitled to sell it for. That is the position in which she would have been, if that had been done. Well, we may suppose he did not mean that, and that it was used as a threat to get her to pay him. But what a dangerous position for a solicitor to be in! Well, it is put into the hands of other solicitors, and thereupon it is said that several solicitors applied to him for explanations of what he had done, that is to say, what he had paid, and what his costs were. Upon that he is indignant — indignant that he should be asked for explanations. At last the present solicitor

C. A. 1883 MACLEOD v. JONES. Brett, M.R.

comes and writes to him, as it seems to me, a very reasonable letter. He says, "Tell me what you have paid for these things; tell me what your costs are that I may advise that person, who is now my client, whether she should pay you off at once, or allow you to sell, or what is best for her to do?"

This is his answer:—"I will not give you the smallest information or shew you a paper unless you do something"—which it was probable the solicitor would not do, or in other words—"I will not give you any information, and I shall proceed to a sale to-morrow." And to sell for what? Why up to the last moment it is not to sell for the amount of the mortgage, not to sell for what he has paid for the mortgages, but for what he has advanced to the lady and his costs against her, and to sell without giving any account—nothing but his own word for the amount he has advanced, the amount he had paid for the mortgages, and for the costs; and without any opportunity being given of judging whether they were fair and reasonable or not.

Upon that it is argued that he has the right, that he is mortgagee, and has the right to do that without giving any account whatever—the argument is pushed to this extent. Well it follows from the argument, if true, that he might have done that whilst he was her solicitor. It is true that at the moment he assumes this right he is not her solicitor, but if the argument is valid, it must go to this extent—that he might have done that whilst he was her solicitor.

Now I ask myself whether the Court is bound to sit by when that state of things is brought before them, and to say, "Yes, you may." Now if he were simply a mortgagee I do not say he would not have a right to do that, subject to giving an account. So far as I understand the practice of the Court he could not be stopped from selling the estate without the mortgagor paying into Court or otherwise securing to him, not what the Court might think *primâ facie* was due to him as far as they could ascertain, but without paying into Court that which he demanded, subject to a subsequent inquiry. But that is on the theory that he is nothing more than a mortgagee. But is this Defendant nothing but a mortgagee? He is a mortgagee and he has become mortgagee by reason of his being the lady's solicitor, and upon his own advice to her that

that was the best manner of settling her estate. That seems to me to make the greatest difference. It brings him within an acknowledged jurisdiction of the Court. He was a solicitor, and she was his client at the time these transfers were made. That gives the Court a jurisdiction over him beyond the jurisdiction that it has over a mere mortgagee. It is the jurisdiction which the Court exercises as between solicitor and client, and I take it the real meaning of it is this. That where matters are called in question as between solicitor and client, inasmuch as the client has thereby lost the advice of the solicitor, the Court steps in and looks for itself, and as far as it can, to a certain extent, acts for the client in a way the solicitor would have done if he had been only solicitor, and expected to give her the advice for which he is paid as solicitor. Therefore where a solicitor is nominally the mortgagee, and when he assumes to exercise his right to sell as mortgagee, it seems to me the Court has jurisdiction to inquire immediately into the circumstances of the case, and will not allow the solicitor to exercise his unqualified rights as mortgagee, but will only allow him to exercise those rights subject to the control of the Court, and to his doing so in an equitable and fair manner as between a solicitor and his client.

Under those circumstances the Court I think will consider amongst other things what is the debt for which the solicitor as mortgagee is claiming to sell, and will inquire whether *primâ facie*, or so far as the Court can see, his claim in regard to the amount for which he is claiming to sell is a valid one. They will inquire also into the condition of the security which he is threatening to sell, and see whether it is a security which is a hazardous, or a safe one. That might make a great deal of difference as to the terms on which the Court would allow him to sell. The Court will certainly also look at this, whether in this very delicate position in which by his own act and on his own advice he has put himself, he has done that which is fair to the client, namely, given the client all the information he ought to do now that he is going to act adversely to the client to enable that client to take other advice. The Court will consider whether he has given an account, or a fair account, of his claims against his client.

C. A.
1883
MACLEOD
v.
JONES.
Brett, M.R.

That leads me to consider what the Court ought to do in the present case. The action in which this application is made was an action which was complicated, and which might have raised many difficulties, but it is now by admission to be simplified into a simple action against Mr. *Jones*, which will insist that he is to give an account of his claims against his client, which account shall be inquired into. That he should be allowed to sell before he gives that account and before there are fair opportunities for testing that account seems to me to be impossible. The Court will not allow it. But then the Court must consider the probable justice of his claims. Now it seems to me that although the Court does not decide what the result will be, yet it can see that in all probability the Plaintiff will be entitled to insist on his security in respect of the money he has expended in order to purchase these mortgages to which he is not a party; and that he would be entitled to disbursements fairly made for keeping up these policies, and also for the sums he says he has advanced on mortgage. It does not seem to me to be at all probable that he will be entitled by reason of the mortgage which he took in August, 1880, to insist on the right to sell in respect of costs which were not incurred at that time. I say that it does not seem to me to be probable, though it is not necessary to decide that point now. And therefore it seems to me that the Court will consider that he may probably, although the Court does not decide, be entitled to insist on his right to sell in respect of a sum of something like £1326.

Then the Court must consider the nature of his security. Now we need not accept all the absurd reasons suggested in the affidavits tending to shew that the security which the Defendant is assuming to sell is worth nothing at all. He has done that in argument which is so often done, he is insisting on his right to sell a property to-morrow which under stress of argument to-day he has been trying to shew is not worth a shilling. Without considering those reasons, it is unnecessary to say that the Court passes its own judgment on them. Now I take it that this security is a hazardous security. If it had been a freehold property about which there was no difficulty as to title I should have thought we might have adopted a different course in this particular case.

But it is a hazardous property, and therefore I am of opinion that we ought not to grant this injunction without seeing that Mr. *Jones* is secured in respect of the probable amount to which we think he may be entitled.

Then, I think, we must take it that he is virtually secured by the sums which have been mentioned as being moneys under the authority of the Court, either paid into Court or in the hands of the receiver. That amount comes to something like £978. That seems to leave a margin of about £348, or say £350. Now some time will be required to amend this writ, or to amend these proceedings, to simplify them into the action which it is said they are to take finally. Then of course the £350 is not to be found here at the desk, and there may be some time in which the Plaintiff may find the £350, which I think ought to be paid into Court. Therefore the substance of what must be done is this: The sale cannot take place to-morrow as threatened. It will be forbidden until in the amended action an account is taken if within a week the Plaintiff pays into Court £350. If within a week the Plaintiff does not pay £350 into Court then the injunction will not take effect, and at the end of a week this gentleman will be entitled to exercise his rights and to realize his securities—at least we do not interfere. We do not give him authority to do it; but we do not interfere, he will have to act at his own risk. But for a week we forbid the sale, and we forbid the sale until the account has been taken in the amended action, giving the Plaintiff a week to amend the proceedings.

COTTON, L.J.:—

This is an application to restrain a mortgagee from exercising his power of sale. Now under ordinary circumstances the Court never interferes unless there is something very strong; it does not interfere on any suggested case without requiring the Plaintiff applying to pay into Court not what the Judge or the Court on hearing the evidence is satisfied will probably be the amount due, but what the mortgagee, the accounts not having been yet taken, swears is due to him on his security. And that is perfectly right, because we ought not to prevent mortgagees from exercising the powers given to them by their security without

C. A. 1883 MACLEOD v. JONES. Cotton, L.J.

seeing that they are perfectly safe. But in the present case I think the Defendant stands in a different position. The greater part of the securities which he holds were securities of which he took a transfer, and at the time he took a transfer he was the solicitor of the Plaintiff and gave her what I think was reasonable advice, that instead of all these securities, of which there are several, being in the hands of different mortgagees, which greatly added to the costs in the administration suit, the mortgages should be consolidated so that there should be less costs in that suit, and also that it would be better to protect her life interest in other respects. That being so, and having a mortgage for a very small amount besides, he buys up the securities.

Then this first consideration occurs, that of course he is not entitled to stand in the same position as the mortgagees whose securities he bought up. He did whatever he did as solicitor, and as a person in a fiduciary position to the Plaintiff, and all he is entitled to claim as against the property comprised in these securities is the amount which he on her behalf expended for the purpose of buying up these securities. In the present case even if we were convinced that the Defendant never did anything to claim as against the Plaintiff on the sale of the property the full amount of the mortgages—which I doubt—yet he certainly never gave, before he attempted to sell, any account to shew what it was that was due to him for moneys advanced for the purpose of getting these securities vested in him—to shew that that was all for which he claimed to be entitled, adding of course to that any sum which he subsequently paid for premiums or otherwise to keep the policies of insurance in force. When a solicitor acting for his client does buy up securities, in my opinion he is not entitled to sell until he has rendered to his client, or to the mortgagor who was his client when he entered into this transaction, an account shewing what sum is really due to him in order that the client may know what the solicitor has a right to call upon him to pay in order to prevent the sale. That therefore makes this case an exception from the ordinary case of a mortgagor and mortgagee; but still I think the Court ought not to interfere without seeing that the mortgagee is safe. Under ordinary circumstances it says that the mortgagee is to be made safe by having payment

into Court, as I mentioned, of the full amount which is sworn by him to be due. In my opinion such a rule ought not to be applied to a case where there is a solicitor who is a mortgagee applying to enforce securities against a client. Then I think what the Court ought to do is to see that he shall be safe when the account is taken and it is ascertained what is really due.

Therefore, I think what has been proposed by the Master of the Rolls will be the proper course to be taken in this case; not that the amount which he claims, namely £2000, should be paid into Court, but that such an amount should be paid in as, having regard to the nature of the security, which is undoubtedly a risky one, will make him safe until it is made plain what has been expended by him for his client.

But, then, I think we ought to go a little further, because this action in which the motion is made was an action which did not propose to redeem the securities, and it introduced a great many matters as regards which no *primâ facie* case has been made out, and if we were to let the action remain in the present form the Defendant might be delayed during a litigation for which, as far as I can see, neither as against him or his co-Defendant *Digby*, is there any foundation. Therefore, I think that before we grant this relief we ought to require the Plaintiff to amend her writ by making Mr. *Jones* the sole Defendant, and by making it an action to redeem the securities, and by putting the suit in such a state that within a reasonable time an account can be taken of what is really due to Mr. *Jones*. When that is ascertained then the Plaintiff must either pay it or there must be an order for the sale of the property. Because although a solicitor acting in the way in which Mr. *Jones* has acted stands in a very different position from an ordinary mortgagee as regards the terms on which the Court will interfere, yet, in their opinion, there is no ground for saying that he is not to be repaid and not to make his security available for that which he has really spent on behalf of his client for the purpose of consolidating these securities. Therefore I agree with the Master of the Rolls that the proper course will be to grant an injunction till further order to restrain the sale, on the undertaking of the Plaintiff to amend the writ in the way I have mentioned, and she must pay into Court within the time

C. A. 1883 MACLEOD v. JONES. Cotton, L.J.

mentioned by the Master of the Rolls the sum of £350, and I think the Defendant may well be satisfied with that. If that money is not paid in then without further order the injunction is to go.

Then I am of opinion (though I do not think that ought to be made part of the order) that in order to facilitate the settlement of this matter the Defendant should give an account as soon as possible to the Plaintiff of what he claims to be due and owing. When that account is rendered, if it is disputed by the Plaintiff she may at once ask for an account in Chambers to ascertain what really is due, and I think that the proper course will be, when that account is rendered, that there shall be liberty for the Defendant to apply to discharge the injunction. It ought not to be discharged in my opinion, if the amount is disputed, until the account is taken, and it is ascertained by means of the account what is really due and owing to the Defendant.

BOWEN, L.J.:—

I am of the same opinion, and I really should not say anything if it were not that the Court is differing from the decision of the very competent authority of the Judge in the Court below, and therefore, out of respect to the learned Judge whose decision we are overruling, I think it right to add a few words as to the ground upon which I differ from the view that he took.

This is an application by the Appellant for an injunction to prevent the Defendant from realizing certain securities which he claims to realize as mortgagee. Now if it was an ordinary case as between mortgagor and mortgagee, the relief which the Appellant asks would not in the ordinary course be granted, except on the terms of bringing into Court such sums as the mortgagee swore were due to him under his mortgage. But even if it was such an ordinary case it would be remarkable, and might be material to remember, that the Defendant has not anywhere condescended to give an exact statement of the amount which is due to him.

But the strength of the case of the Appellant is that the Defendant is here not mortgagee alone. It is quite true that he is a mortgagee, but he is a mortgagee and something else. At the time he became mortgagee he was the solicitor of the lady, and

he became mortgagee upon a desire expressed by her, or at all events on a suggestion acquiesced in by her, that there should be a transfer and consolidation of the securities which she had given, and it was arranged in her interests and for her benefit that he, her solicitor, should take a transfer of, at all events, a certain number of these securities to himself. Therefore this solicitor, while he was her solicitor, clothed himself with another capacity besides that of solicitor.

What is the effect of a solicitor taking upon himself that sort of additional and distinct function? He still remains a solicitor. He still has duties to perform as solicitor. For the benefit of his client he also becomes, in substitution of other creditors, her creditor to the extent of such sums as he expends in her interest and for her benefit; that is to say, if thereupon he takes the mortgages himself, he acquires all the powers of a mortgagee which are necessary for securing such of his own rights as are compatible with a continuance of the relationship of solicitor and client, and for securing those rights in such a way as is consistent with his duty as solicitor. It seems to me that he acquires no more power than that. He may be her creditor and secure himself as such creditor, but only so far as it is consistent with his duty to her as her solicitor that he may do so.

Now what are the duties of a person who is a solicitor and who discharges this sort of function for his client? One would say that it must be the very essence of his obligation that he should tell her what is owing, at all events before he came down upon her and sold her up. If it was the case of an ordinary agent it would be the part of the ordinary agent to account, and it would certainly be part of the solicitor's duty to advise his client, and tell her what was owing. But then it is said he is no longer the lady's solicitor, and that being so, he may at once treat himself as a mortgagee. I think that is a fallacious proposition. He cannot disengage himself from the relation of solicitor by cutting a clean line between himself and his client at the exact moment at which he ceases to be solicitor. He must wind up properly the relationship of solicitor and client, and he must not enforce his rights as mortgagee against his client and sell without giving her a full and frank account of what he seeks to claim

C. A. 1883 MACLEOD v. JONES. Bowen, L.J.

against her. I should have imagined that it would not require an experienced common law or equity lawyer to say that this would be fair dealing between solicitor and client. At any rate, it is such dealing as the Court will enforce.

That being so, I think the rights that the solicitor acquired, which I admit he did acquire to protect himself as mortgagee up to a certain point, must be exercised with reference—I will not say to that continuing relation, because the relation had come to an end—but to a continuing duty to give an account of his stewardship.

On those grounds I think it is extremely questionable whether the solicitor had any right at all without giving such an account; but it certainly imposes upon the Court the duty of preventing him from selling the property, unless it is clear that justice will be done by so doing, and it discharges the Court from the necessity of seeing that so onerous a condition of relief is imposed upon the Appellant as that which would be imposed upon him in the case of an ordinary mortgagee. I think it is sufficient to see that by restraining the sale no harm is done to the solicitor. I do not think the ordinary rule applies, because this is not a case against a mortgagee simply, it is a case against a mortgagee and something else.

BRETT, M.R.:—

Without giving the grounds—you must give us credit for having considered this matter—we think that justice will be done by ordering that there shall be no costs of the proceedings before Mr. Justice *North*, that the Plaintiff shall have the costs of this appeal, to be set off in the taxation of costs as between the Plaintiff and the Defendant in the cause.

Solicitors: *Morice, Toller, & Blakesley; A. Jones & Co.*

M. W.

C. A.
1883
July 18.

CROPPER *v.* SMITH.

[1881 C. 2207.]

Practice—Stay of Proceedings pending Appeal—Refusal by Court below to stay —Time within which Application may be made to Court of Appeal—Rules of Court, 1875, *Order* LVIII., *rr.* 16, 17.

In an action by patentees judgment was given referring it to the official referee to assess the damages occasioned to the Plaintiffs by the Defendants' infringement, and ordering payment within twenty-one days after service of the report. The Defendants appealed, and set down their appeal on the 18th of April, and then moved to stay proceedings under the judgment pending the appeal. This was refused by *Chitty*, J. On the 25th of June, the official referee made his report, and on the 14th of July, more than twenty-one days after the above refusal, the Defendants gave notice of motion before the Court of Appeal that the time for payment of the damages might be extended till after the hearing of the appeal. The Plaintiffs took the objection that the application could not be made as an original motion, and as an appeal motion was out of time:—

Held, that Order LVIII., r. 16, gives concurrent jurisdiction to the Court below and to the Court of Appeal as to staying proceedings pending an appeal; that rule 17 does not take away any of the jurisdiction thus given to the Court of Appeal, but only requires that it shall not be exercised till an application has first been made to the Court below, and that the application to the Court of Appeal to stay proceedings when an order for that purpose has been refused by the Court below, is not properly an appeal motion, and need not be brought within twenty-one days from the refusal.

Attorney-General v. *Swansea Improvements and Tramways Company* (1) considered.

THIS was an action for infringement of a patent, and by the judgment of Mr. Justice *Pearson*, dated the 26th of March, 1883, it was, among other things, ordered that it should be referred to the official referee in rotation to inquire whether any and what damages had been sustained by the Plaintiffs by reason of the infringement of their patent by the Defendants, and that the Defendants should pay to the Plaintiffs the amount awarded within twenty-one days after service of the official referee's report, and the Defendants were ordered to pay the Plaintiffs' costs.

(1) 9 Ch. D. 46.

C. A. 1883 — CROPPER v. SMITH.

The Defendants gave notice of appeal, and the appeal was set down on the 18th of April.

After this the Defendants moved before Mr. Justice *Chitty* to stay proceedings under the judgment pending the appeal, and this application was refused with costs.

On the 25th of June the official referee made his report, awarding the sum of £730 10*s.* as damages.

On the 14th of July, more than twenty-one days after the refusal by Mr. Justice *Chitty* of the application to him to stay proceedings pending the appeal, the Defendants gave notice of motion before the Court of Appeal that the time limited by the judgment for payment of the amount awarded by the official referee's report might be extended until after the hearing of the appeal, and that payment of the costs might also be postponed until after the hearing of the appeal, and that the Plaintiffs might be restrained from interfering by issue of circulars or otherwise with the Defendants' customers, and preventing the payment of sums due to them for machines supplied.

The Plaintiffs had sent a circular to persons who had bought from the Defendants machines made in infringement of the Plaintiffs' patent, warning them against paying the Defendants for the machines, as the Plaintiffs had obtained a judgment against them for damages which had not been paid.

Aston, Q.C., and *Goodeve*, for the motion.

Romer, Q.C.:—

I take the preliminary objection that this application does not purport to be an appeal motion, and if it did is out of time, and that it cannot be made as an original motion to the Court of Appeal under Order LVIII., rules 16, 17, but only as an appeal motion: *Attorney-General* v. *Swansea Improvements and Tramways Company* (1) which explains *Cooper* v. *Cooper* (2); *Otto* v. *Lindford* (3).

[BRETT, M.R., referred to *Maclean* v. *Vaughan* (4).]

The Court determined to hear the case on the merits.

(1) 9 Ch. D. 46.
(2) 2 Ch. D. 492.
(3) 18 Ch. D. 394.
(4) 20 Sol. J. 723.

Aston, Q.C., and *Goodeve*, for the application:—

The interference of the Plaintiffs with our customers is not fair, it will ruin our business even if the appeal is successful, and it prevents our getting money to pay the damages if we are unsuccessful: *Adair* v. *Young* (1). This proceeding of the Plaintiffs makes it right that the time for payment of the damages should be extended, as the Plaintiffs are wilfully taking steps to prevent our being able to pay them. The notices are altogether improper, for where damages are given the patentees cannot have profits too. They therefore have no right to give notices to our customers to pay us at their peril, for the damages paid by us preclude all claims by the Plaintiffs against our customers: *Neilson* v. *Betts* (2).

[BRETT, M.R.:—You are asking us for an injunction—how can we grant it?]

The Court of Appeal has full seisin of the matter and can make any order that is just: *Polini* v. *Gray* (3).

[THE COURT asked whether the Plaintiffs were in a large way of business, and was informed by the Defendants' counsel that they were.]

Romer, Q.C., *Chadwyck Healey*, and *Cann*, for the Plaintiffs, were not called upon.

BRETT, M.R.:—

Upon this application being made, a point was raised by way of preliminary objection that, assuming this to be an application for the stay of proceedings, this Court had no jurisdiction to entertain it, because it can only be made here by way of appeal, and as an appeal it is too late. We have then to consider whether when an appeal to this Court is pending, this Court has any jurisdiction to entertain an application to stay proceedings under the order appealed from, except by way of appeal, and under all the conditions of an interlocutory appeal. It was contended by Mr. *Romer* that this Court has formally decided that such an application is

(1) 11 Ch. D. 136.
(2) Law Rep. 5 H. L. 1.
(3) 12 Ch. D. 438.

C. A. 1883 CROPPER v. SMITH. Brett, M.R.

an appeal subject to all the conditions of an appeal, and for that the cases of *Attorney-General* v. *Swansea Improvements and Tramways Company* (1) and *Otto* v. *Lindford* (2) were cited. The view taken on the other side is that such an application is not a mere appeal, but that there is an original jurisdiction in this Court to stay the proceedings pending an appeal where an appeal is before this Court. The right to apply to this Court has been made subject to the obligation to make first an application to the Court which made the order appealed from, and the question is whether that condition makes the application an interlocutory appeal simple, subject to all the conditions of interlocutory appeals. That question depends upon the true interpretation of Order LVIII., rules 16 and 17. [His Lordship read the 16th rule.] By that rule it is assumed that the Court of Appeal has jurisdiction, and to my mind, according to the true reading of that rule, not a jurisdiction by way of appeal merely, but an independent jurisdiction, and if that rule had remained alone it would have been obvious to my mind that the application might have been made either to the Court appealed from or to the Court of Appeal. Then the 17th rule says that, "Wherever under these rules an application may be made either to the Court below or to the Court of Appeal" (which in terms assumes that but for what is going to be said immediately afterwards it might be made either to the Court below or to the Court of Appeal) "it shall be made in the first instance to the Court or Judge below." That imposes a limitation on the action of the Court of Appeal, but a limitation not affecting its jurisdiction, and does not at all shew that the motion in the Court of Appeal is an appeal. On the contrary, the 17th rule seems to me to first assume, as the 16th rule did, that it is not an appeal, that there is an alternative jurisdiction, and alternative jurisdiction is of course co-ordinate. Then in order that the Court of Appeal and the Court below may not incur the risk of deciding in different ways as to staying proceedings without either of them knowing of the application to the other, the rule imposes this limitation, that although the jurisdiction is co-ordinate, and although it is alternative, yet the Court of Appeal will not exercise its jurisdiction until it knows

(1) 9 Ch. D. 46. (2) 18 Ch. D. 394.

whether the co-ordinate jurisdiction of the Divisional Court has been exercised and how. That seems to me to be the true reading of the 17th rule.

But then it is said that the rule has been construed differently in the case of *Attorney-General* v. *Swansea Improvements and Tramways Company* (1). In that case an appeal had been brought by the defendants from a judgment of Vice-Chancellor *Hall*, and an application was made to him to stay the proceedings under that judgment pending the appeal. Therefore there was an application to the Court below, but the Vice-Chancellor did not decide it either one way or the other, but ordered the motion to stand over for a week to await the result of an application to the Court of Appeal to advance the hearing of the appeal. The defendants made that application to the Court of Appeal, but they also joined with it an application to the Court of Appeal to stay proceedings pending the appeal. Now inasmuch as the Vice-Chancellor had not entertained the application before him so as to decide it either one way or the other, and the applications before both Courts were pending at the same time, it seems to me that the 17th rule was plainly broken, and thereupon the decision of the Court of Appeal was, "We cannot entertain this application until there has been a decision in the Court below." The Vice-Chancellor then heard the application and granted a stay of the proceedings. Then it was thought right for the defendants to go to the Court of Appeal and say, "We have dropped our application to the Court of Appeal to stay proceedings." This shews they were under the impression that they might have come to the Court of Appeal, not making a new application by way of appeal, but going on with the old application, otherwise they could not say they had dropped it. It is obvious then that the counsel engaged in the case did not understand the decision of the Court to be that the motion by the Court of Appeal must be an appeal strictly so called. It is true that the Master of the Rolls, the late Sir *George Jessel*, used phraseology which might be read as shewing that he thought it must be an appeal. He says (2), "The rest of the motion must stand over to await the result of the application to the Vice-

(1) 9 Ch. D. 46. (2) 9 Ch. D. 47.

C. A. 1883 CROPPER v. SMITH. Brett, M.R.

Chancellor to stay the proceedings. Probably what Lord Justice *Mellish* meant" (in *Cooper* v. *Cooper* (1)) "was that the motion might be heard without being formally set down as an appeal." What does that mean? It surely did not mean that the only thing that Lord Justice *Mellish* meant was that the motion need not be put in a list, because putting it in a list has nothing to do with the law or with the rule. I think he meant that the motion was not strictly an appeal, but in the nature of an appeal. But the Master of the Rolls goes on to say (2), "It must necessarily be a motion by way of appeal, for this Court and the Court below cannot have co-ordinate jurisdiction." The last part of this sentence is I think incorrect. It is quite true that under the 17th rule the motion in the Court of Appeal must be by way of appeal, because there cannot be an application to the Court of Appeal to stay the proceedings unless the Court below has refused to stay them, and then, although the motion in the Court of Appeal is under its original jurisdiction, yet it is correct to say that it is by way of appeal, because it is made for the purpose of getting a different decision from that which has been come to by the Court below. Therefore all the expressions of Sir *G. Jessel*, except this last one, that the Court below and this Court cannot have co-ordinate jurisdiction, seem to me to be strictly correct. The Master of the Rolls having dropped that expression it is not to be assumed that my brother *Cotton* and I, because we concurred in the decision (probably without saying anything) are to be taken to have agreed to every word which fell from the Master of the Rolls, it being our business only to see before we concur in a decision that it is in our opinion right and substantially put upon right grounds, and not to correct any error in grammar, any supposed inaccuracy of expression.

Then we come to the case of *Otto* v. *Lindford* (3). The plaintiff there appealed from an order directing him to pay costs, and his solicitor wrote to the defendant's solicitor offering to pay the amount of costs into Court, or to pay them to the defendant's solicitor, on his personal undertaking to refund them if the appeal was successful, and to this letter no answer had been

(1) 2 Ch. D. 492. (2) 9 Ch. D. 47.

(3) 18 Ch. D. 394.

returned. The plaintiff asked for leave to give short notice of motion to restrain the defendant from enforcing the certificate for costs, pending the appeal, and the Master of the Rolls says: "Have you applied to the Court below?" The plaintiff's counsel thereupon cited *Wilson* v. *Church* (1), and the Master of the Rolls says (2): "That was a case of an entirely different description. The plaintiffs there were asking for an injunction to restrain the trustees from parting with the trust funds pending the appeal. That was not an application to stay proceedings under the order appealed from, for that order did not give any directions for dealing with the funds, and the Court below having dismissed the action, had no jurisdiction to grant such an injunction. In the present case, the plaintiff is seeking a stay of proceedings under the order appealed from, which application the Vice-Chancellor has jurisdiction to entertain, and it ought to be made to him in the first instance." That is nothing more than rule 17. My brother *Cotton* says (3): "I also was a party to the decision in *Wilson* v. *Church*, and I agree with the view taken of it by the Master of the Rolls."

It seems to me that these cases do not contain anything that conflicts with the view I have expressed as to the true construction of rules 16 and 17—viz., that there is an independent jurisdiction in this Court to stay proceedings pending an appeal, but that the Court is not to exercise that independent jurisdiction until an application has been made to the same effect and decided upon in the Court appealed from, and that that is the only condition limiting the exercise of the jurisdiction of this Court. It does not limit the jurisdiction, it limits the exercise of it, but in every other respect the motion here is an original motion and it is not subject to the other conditions of an interlocutory appeal. We must then treat this as an original motion.

The motion is to stay the proceedings in respect to the payment of the sum decreed. Whether the Court will do this is a matter of discretion, and must depend upon the circumstances of

(1) 11 Ch. D. 576. (2) 18 Ch. D. 394.
(3) 18 Ch. D. 395.

C. A. 1883 CROPPER v. SMITH. Brett, M.R.

each case. It must depend very much upon the amount of the sum and the position and condition of the parties who are decreed to pay, and of the parties to whom the money is to be paid. Here the Plaintiffs being manufacturers in a large way of business there is no doubt of their ability to repay the sum of £730 if the appeal should succeed, and under all the circumstances the Court does not see any reason to stay proceedings as to the payment to them of that sum. Then as to the other part of the application it is said that the notices served by the Plaintiffs were not a fair proceeding on the part of the Plaintiffs, and we are asked to restrain them from serving those notices. Whether those notices are what would be called in business fair proceedings or not, I am not called upon to say, I am not prepared to say that they are not. The effect of them seems to be this: "We have got a decree against *Smith & Sons* who have sold you these machines, they have been infringing our patent." The letters do not go on to say: "You must pay us the price of these machines," which would have been utterly wrong, though I am not prepared to say that we could have issued an injunction even if the letters had said so, but they only say in substance: "We give you notice that you had better not pay *Smith & Co.*, because if you do, and they do not pay us the damages awarded to us, we shall most certainly come upon you to pay us whatever is due to us in respect of your having purchased infringing machines." That is their right according to law, they would have a right to go against the purchasers if the damages were not paid by *Smith & Co.* It seems to me therefore that the Court cannot interfere with these circulars on the ground that giving such a warning is improper.

Then it is said that by these circulars the Plaintiffs prevent the purchaser from paying the Defendants and thereby prevent the Defendants from receiving money wherewith to pay the damages; but that is not a sufficient ground to induce this Court to interfere. The Court has nothing to do with the means which the Defendants may have to take in order to enable them to pay the damages which are decreed against them. I think therefore that the application must be dismissed.

COTTON, L.J. :—

I agree with the Master of the Rolls that this application must be dismissed.

The preliminary objection to the application raises a question of some importance. The 16th rule of Order LVIII. provides that an appeal shall not stay the execution of the decree appealed from, except so far as the Court below or the Court of Appeal may so order. That undoubtedly gives co-ordinate jurisdiction to the Court below and the Court of Appeal, and if it stood alone this Court might without any application having been made to the Court below, entertain an application to stay proceedings as distinguished from an application to grant an injunction for the protection of the property pending the appeal. But then rule 17 provides that where the application may be made under any of the rules either to the Court below or to the Court of Appeal, then it shall be made in the first instance to the Court below. That prevents this Court from entertaining an application to stay proceedings until a similar application has been made to and refused by the Court below. In one sense, therefore, the application here is in the nature of an appeal, it is coming to this Court and asking it to exercise the original jurisdiction given to it under sect. 16, where the Court below has on a similar application declined to exercise the jurisdiction given to that Court. The Court of Appeal is asked to vary what has been done by the Court below, and in that sense it is an appeal. But what we have now to consider is whether it is an appeal within the rules and orders which prescribe and regulate how appeals from decisions given by the Court below, and as regards which this Court has no jurisdiction except by way of appeal, are to be entertained, and the time within which they are to be made to this Court if they are made at all. In my opinion those rules do not apply to an application of this nature where the Court has original jurisdiction, subject only to the proviso that it shall not exercise it until it has been seen what the Court below will do. I do not mean by this to favour the idea that parties may come at any time to this Court, or that this Court will after great delay entertain a renewal of an application which has been refused by the Court below. The party who has delayed must shew why he

C. A. 1883 CROPPER v. SMITH. Cotton, L.J.

has delayed, and probably would not get any order, unless he either gives a satisfactory explanation of the delay or comes on new grounds. No case of delay, however, is suggested here. The question is only whether the lapse of twenty-one days from the refusal of the application by the Court below precludes its being renewed here. In my opinion the objection cannot prevail. The only difficulty arises from one expression used by the Master of the Rolls in the decision of *Attorney-General* v. *Swansea Improvements and Tramways Company* (1). What he first says is that it must necessarily be a motion by way of appeal. Undoubtedly, it must be so in the sense I have mentioned. But what follows is more difficult, and, in my opinion, if the words have their natural meaning given to them, is undoubtedly incorrect: "This Court and the Court below cannot have co-ordinate jurisdiction" (2). "Co-ordinate" there is an unfortunate word, which I think was inaccurately used by the Master of the Rolls to express the idea that this Court would not entertain an application to stay proceedings while an application for the same purpose was pending in the Court below. In that case the parties went in the first instance to the Court below to satisfy the rule, but the Court below had not disposed of the application, so it was still a pending application in that Court, and I think that what the Master of the Rolls meant was that the application could not be pending in both Courts at the same time, and that therefore the Court below must dispose of it before this Court would entertain it.

I need not add anything to what has been said about *Otto* v. *Lindford* (3). It only came to this, that under the rules the application must be made in the first instance to the Court below.

As regards the merits, I think the applicants have made out no case. They do not suggest that if the £730 is paid to the Plaintiffs, it will not be repaid if the appeal is successful, nor that they are under any apprehension that they will not get the costs back again. All that they say is: "The Plaintiffs by issuing these notices are preventing us from getting money to pay them the damages." It is very unlucky for the Defendants that they

(1) 9 Ch. D. 46. (2) 9 Ch. D. 47. (3) 18 Ch. D. 394.

have no money wherewith to pay them; but this notice of which they complain simply comes to this: "If you pay that money to the Defendants you will do it at your own peril, for we have a claim for damages against them which they have not paid, and we give you notice that if you pay them and we do not get the damages from them, we shall not proceed against you any less strictly than the law allows us." We cannot, unless what the Respondents on the appeal are doing can be treated as an interference with the exercise of the appellate jurisdiction of the Court, and therefore a contempt, interfere simply because the Respondents are doing something which may embarrass the Defendants in providing for payment of the damages. In fact the application which is based on those letters to stay the payment of the damages is somewhat inconsistent, for the notices are based on the fact that the damages are not paid, and why, in consequence of these notices, we should stay the payment of the damages, I cannot see. In my opinion there is no ground for our interfering.

BOWEN, L.J.:—

I am of the same opinion, and will not add anything as to the merits; but I will say a few words as to the preliminary objection. I think it is clear if we go to the fountain-head—rules 16 and 17 of Order LVIII.—that the application to this Court is not an appeal within the meaning of the rules limiting the time allowed for appeals, but is a renewal before the Court of Appeal of an application already made to the same effect to the Court below. I think it is impossible to read rule 17 without seeing that the motion to this Court is an application of an original kind, although it is a renewed application, that is to say, although the rule makes it essential that a like application should have been previously made to the Court below. The only difficulty in the case arises from the language of the Master of the Rolls in *Attorney-General* v. *Swansea Improvements and Tramways Company* (1). The decision in that case was, as it seems to me, perfectly right. All that it decided was that rule 17 must be observed, and that before the application was made to the Court

(1) 9 Ch. D. 46.

C. A. 1883 CROPPER v. SMITH. Bowen, L.J.

of Appeal there must have been a previous application made to and disposed of by the Court below. The late Master of the Rolls, however, there uses language which although it is perhaps capable of being explained away if you regard exactly the nature of the case before him, nevertheless if read in its natural sense is inaccurate. It is not true that an application of this kind is an appeal, and it is true that in a certain sense this Court has what the late Master of the Rolls said it had not—co-ordinate jurisdiction to hear such an application. Indeed, from the remarks which he made, and which were not necessary for the purposes of the decision, he seems to me to have misunderstood the effect of *Cooper* v. *Cooper* (1), and the meaning of what Lord Justice *Mellish* there said. If the reports of that case in the LAW REPORTS and the *Law Journal* are compared together, it is pretty clear that the Court of Appeal then thought, just as the Court of Appeal to-day thinks, that rule 17 means that both Courts have original jurisdiction, for the argument being there used on the renewed application that it was an application to override the discretion of the Court below (which would have been a fair argument if the case had come before the Court by way of strict appeal), Lord Justice *Mellish*, with the concurrence of the rest of the Court, points out that that was not the kind of application that was being made; that it was not an attempt to induce the Court of Appeal to overrule the discretion of the Court below, but an application to the discretion of an independent Court. That language of Lord Justice *Mellish* shews that he did not mean what the Master of the Rolls supposes him to have meant, and when the case is carefully examined it appears to me to shew that the Court in 1876, composed of Lord Justice *James*, Lord Justice *Mellish*, and Lord Justice *Baggallay*, took exactly the same view of rules 16 and 17 as we are taking of them to-day.

Solicitor for Plaintiffs: *F. Needham.*
Solicitor for Defendants: *R. W. Marsland.*

(1) 2 Ch. D. 492.

H. C. J.

In re AGAR-ELLIS.
AGAR-ELLIS *v.* LASCELLES.

C. A.
1883
July 23, 24.

[1878 A. 95.]

Ward of Court—Infant above the Age of Sixteen—Years of Discretion—Paternal Authority—Free Access to and by Mother restricted—Jurisdiction of Court— 12 *Car.* 2, *c.* 24 [*Revised Ed. Statutes, vol. i. p.* 725].

A father has a legal right to control and direct the education and bringing up of his children until they attain the age of twenty-one years, even although they are wards of Court, and the Court will not interfere with him in the exercise of his paternal authority, except (1) where by his gross moral turpitude he forfeits his rights, or (2) where he has by his conduct abdicated his paternal authority, or (3) where he seeks to remove his children, being wards of Court, out of the jurisdiction without the consent of the Court.

A father put restrictions on the intercourse between his daughter in her seventeenth year, who was a ward of Court, and her mother, on the plea that he believed the mother would alienate the daughter's affections from him. The Court refused to interfere.

THIS was an appeal from a decision of *Pearson*, J., dismissing a petition by an infant, who was a ward of Court, and her mother, under these circumstances.

The Hon. *Leopold Agar-Ellis*, a Protestant, married the Hon. *Harriet Stonor*, a Roman Catholic, in February, 1864. There were four children of the marriage, the eldest of whom, a boy, died in 1872.

At the time of the marriage Mr. *Agar-Ellis* promised his wife that all the children of the marriage should be brought up as Roman Catholics, but soon after the birth of the first child he determined that they should be brought up as Protestants, to which determination he adhered. Mrs. *Agar-Ellis*, however, unknown to her husband, and in spite of his express directions, so indoctrinated the three remaining children with Roman Catholic views that ultimately, in 1878, when they were nine, eleven and twelve years of age respectively, they refused to go with their father to a Protestant place of worship. He thereupon, in June, 1878, instituted this action to make his children wards of Court, and took out a summons for directions as to their

C. A. 1883

In re AGAR-ELLIS. AGAR-ELLIS *v.* LASCELLES.

education. The mother then presented a petition with a view to their being brought up as Roman Catholics. The summons and petition were heard together before the late Vice-Chancellor *Malins* and by the Court of Appeal, and in the result the Court of Appeal restrained the mother from taking the children to confession or to Roman Catholic places of worship without the consent of the father, but, striking out a declaration that the children ought to be brought up as members of the Church of *England*, left it to the father to do what he thought best for the temporal and spiritual welfare of the children. The case is fully reported on this point (1).

Consequent on this decision Mr. *Agar-Ellis* removed his children from the care of their mother, and placed them with clergymen and other persons, allowing the mother to visit them only once a month, and requiring that all correspondence between the mother and the children should pass through his hands, or be subject to his supervision.

In January, 1883, the second daughter, Miss *Harriet Agar-Ellis*, attained sixteen years of age, and soon afterwards she addressed a letter to Mr. Justice *Fry*, to whose Court these proceedings were then attached, begging to be allowed the free exercise of her religion, and to be permitted to live with her mother. His Lordship directed his chief clerk to see the solicitors of Mr. and Mrs. *Agar-Ellis* with a view to some amicable arrangement being made, and ultimately Mr. *Agar-Ellis* made proposals under which Miss *Harriet Agar-Ellis* was to be allowed, subject to his control, to practise the Roman Catholic religion, to attend service at the Roman Catholic church on Sundays and festivals, and to prepare herself for her first communion.

At this time Miss *Harriet Agar-Ellis* was residing with a Madame *Guerini* at *Brighton*, with whom she had been placed by her father. This lady being about to pay a visit of several weeks to her friends abroad, was unable to take Miss *Agar-Ellis* with her, and thereupon the latter, on the 2nd of June, wrote the following letter to Mr. *Hastings*, the senior member of the firm of solicitors acting for her mother:—

"Dear Mr. *Hastings*,—I write again to ask you to apply to the

(1) 10 Ch. D. 49.

Judge for leave that I may spend my vacation with my mother, as you know for this last two years I have been moved about from place to place, and have only had part of one vacation with my mother, which the Judge ordered. The people I am with now are very kind to me, but they want to go abroad in July and are unable to take me with them. Father has no place to take me to, and with one exception has never spent a vacation with us over four years. I am always amongst strangers. I am longing to see some of my relations. I know you will do what you can for me.—Yours very truly,

"*Harriet Agar-Ellis.*"

Under these circumstances a petition was presented by Mrs. *Agar-Ellis* and her daughter, by the Hon. *Catharine F. Stonor* as their next friend, praying that Miss *Harriet Agar-Ellis* might be allowed to visit and spend her next vacation of two months with her mother; and that for the future the mother might be allowed free access to and to visit her said daughter, and that they might be allowed freely to communicate with one another by letter or otherwise.

This petition was strongly opposed by the father on the ground that to allow unrestricted communication between the mother and daughter, either by letter or personally, for so long a period as two months would tend to create a great prejudice in the child's mind against him, and might result in entirely alienating her affection from him.

On the 3rd of July the petition was heard in private by Mr. Justice *Pearson*, and dismissed by him on the ground that, in the absence of any suggested fault on the part of the father, the Court had no jurisdiction to interfere with the legal right of the father to control the custody and education of his children and to decide upon where they should reside.

Against this decision the petitioners appealed.

Higgins, Q.C., and *Ingle Joyce*, for the Appellants:—

Mr. Justice *Pearson* considered that the legal right of the father could not be interfered with; that the case was concluded by the decision of the Court of Appeal (1); and that the fact

(1) 10 Ch. D. 49.

C. A. 1883 — *In re* AGAR-ELLIS. AGAR-ELLIS v. LASCELLES.

that the infant had attained sixteen made no difference. The ward is now a Roman Catholic and attends Roman Catholic places of worship with the assent of the father, who has given up that question. The mother, against whom there is no imputation except that she is a Roman Catholic, now wishes more frequent and less restricted intercourse with her daughter. She is not allowed to communicate with her by letter without her letters being read by third parties, and is in fact reduced to post-cards. We contend that the language of the Court of Appeal on which Mr. Justice *Pearson* relied ceased to be applicable when the ward attained sixteen. We say, first, that after sixteen the infant can reside where she pleases, and that her father has no legal right to her custody against her will; secondly, that the Court will only consider what is good for the infant, and will not regard it as good for her that the natural tie with her mother should be broken; and thirdly, that whatever the legal rights of the father may be the Court will have regard to any conduct on the part of the father which makes it unreasonable for him to resume the exercise of them.

As to the first point, we say that after the infant has attained sixteen the father has no such legal right as he claims. In *Rex* v. *Greenhill* (1) the principle is laid down that when the infant is of an age to exercise choice, the Court will allow him to determine where he will go. *Reg.* v. *Clarke* (2) lays down the same rule. In *In re Shanahan* (3) a *habeas corpus* to remove a boy of fourteen from a Protestant institution was refused to the father, the boy wishing to remain where he was. In *Reg.* v. *Howes* (4) it was laid down that sixteen is the age up to which the father of a female child has a legal right to her custody.

[COTTON, L.J. referred to the observations on p. 336, as to custody up to twenty-one.]

In re Connor (5) the Court recognised the right of a boy of fourteen to choose his place of residence.

[BRETT, M.R.:—The cases to which you refer relate to enabling a father to get possession of a child who is not in his

(1) 4 Ad. & E. 624.
(2) 7 E. & B. 186.
(3) 20 L. T. 183.
(4) 3 E. & E. 332, 337.
(5) 16 Ir. C. L. Rep. 112.

custody. You are asking us to interfere with a father who has the custody.]

Our first step is, that on the above authorities if the child were away from the father he could not get a *habeas corpus* to have her delivered to him against her will. When the infant is come to years of discretion the Court will only free it from illegal restraint without handing it over to anybody: *In re Andrews* (1). In *Mallinson* v. *Mallinson* (2) the order for custody was confined to the age of sixteen. In *Ryder* v. *Ryder* (3) it was held that under sect. 35 of the *Divorce Act* there was no jurisdiction after sixteen.

[BRETT, M.R.:—You cite no case, and I must therefore presume that there is none, in which the Court, except in cases of misconduct of the father, has taken an infant from him.]

No; but the cases lay down clearly that the Court will allow an infant of sixteen to go where it pleases, and that must be on the ground that the father has not a legal right to the custody, or only a right which the Court is at liberty to disregard.

[BOWEN, L.J.:—According to your argument a young lady of sixteen who was stopped by her father from going to *Gretna Green* might bring an action for false imprisonment.]

Then as to the second and third points, the Court will only regard what is for the infant's benefit, and will give effect to any abandonment of the father's rights: *In re Andrews; Andrews* v. *Salt* (4); *Hill* v. *Hill* (5); *Lyons* v. *Blenkin* (6); *Re Esther Lyons* (7), a very strong case. The Court has a discretion: *Stourton* v. *Stourton* (8); *Andrews* v. *Salt*.

[COTTON, L.J.:—It does not seem to me that the rights of a testamentary guardian are as extensive as those of the father.]

In *Johnstone* v. *Beattie* (9) they appear to be treated as standing on the same footing. Mrs. *Agar-Ellis* here only makes a very moderate request; she does not ask that the daughter may live

(1) Law Rep. 8 Q. B. 153, 158.
(2) Ibid. 1 P. & D. 221.
(3) 2 Sw. & Tr. 225.
(4) Law Rep. 8 Ch. 622.
(5) 10 W. R. 400.
(6) Jac. 245.
(7) 22 L. T. (N.S.) 770.
(8) 8 D. M. & G. 760.
(9) 10 Cl. & F. 42, 85.

C. A. 1883 — *In re* AGAR-ELLIS. AGAR-ELLIS v. LASCELLES.

with her, but only that she may spend two months' holiday with her mother; that the mother may be at liberty to visit her; and that the letters passing between them may not be read by third parties.

[BRETT, M.R.:—Is there any authority for interfering against the father even after the age of sixteen, except in cases of his misconduct?]

Ex parte Hopkins (1).

[BRETT, M.R.:—That was only refusing to make an order in favour of the father.]

Wellesley v. *Wellesley* (2); *Lyons* v. *Blenkin* (3), recognises the right of the Court to interfere with a father "if acting in a manner in which he should not": *Re Plomley* (4).

[COTTON, L.J.:—That was a case of a father altering his son's course of life in a way which his own previous conduct made unreasonable.]

Creuze v. *Hunter* (5) is also in our favour.

[BRETT, M.R.:—That was evidently a case of misconduct.]

It shews that when the child is a ward, the Court will prevent the father from acting to its prejudice. The Court has been in the habit of exercising a wide discretion as to access: *Seton* on Decrees (6); *De Manneville* v. *De Manneville* (7). The Court may interfere with the right of the father though he has not been guilty of misconduct: *Talbot* v. *Earl of Shrewsbury* (8); *In re Taylor* (9).

[BRETT, M.R.:—None of the cases referred to appear to me to conflict with the rule laid down by Vice-Chancellor *Bacon* in *Re Plomley*. The Court cannot depart from the rules which have been settled as to the exercise of its jurisdiction.]

Davey, Q.C., and *G. Curtis Price*, for the Respondent:—

Mr. *Agar-Ellis*, rightly or wrongly, considers that he has good

(1) 3 P. Wms. 151.
(2) 2 Bli. (N.S.) 124.
(3) Jac. 245, 253, 262.
(4) 47 L. T. (N.S.) 283.
(5) 2 Cox, 242.
(6) 4th Ed. p. 748.
(7) 10 Ves. 52, 65.
(8) 4 My. & Cr. 672.
(9) 4 Ch. D. 157.

reason to believe that his wife is trying to prejudice his children against him. He therefore is determined not to make any concessions in the way of allowing more unrestricted intercourse. If the principles laid down by the Appellants were to be adopted by the Court, they would produce a revolution in the relations of father and child. Most of the cases that have been cited are decisions at Common Law on writ of *habeas corpus*, and a good deal of the old law is now inapplicable because of the 10th sub-section of the 25th section of the *Judicature Act*, 1873; in all cases relating to infants the rules of Equity are now to prevail.

[BRETT, M.R.:—We do not agree that the law is altered. We think that Courts of Law and Equity administered the law alike in proceedings under writs of *habeas corpus*.]

Then the question is reduced to this, whether the Court will interfere with a father who has the custody of his children, and who is maintaining them in pursuance of a legal and moral obligation. We contend that the Court will not interfere except in three classes of cases. First, where the moral turpitude of the father is so gross, either by reason of his immorality or excessive cruelty, that the Court will not allow him to retain the custody of his children: *Wellesley* v. *Duke of Beaufort* (1) is the leading case on this point; secondly, where, as in *Lyons* v. *Blenkin* (2), the father has abdicated his parental authority in such a way that the Court will not allow him to interfere and resume it; thirdly, where the Court, in the exercise of its peculiar jurisdiction, will not permit its ward to be removed, even by the father, out of its jurisdiction without its consent. *Rochford* v. *Hackman* (3), and *Re Plomley* (4), are instances of this rule. If Mr. *Agar-Ellis* is not allowed to bring up his children in the way that he deems best, he desires to intimate most respectfully to the Court that he will consider himself discharged from all legal or moral obligation to maintain his daughters. There is only a small fund in Court, and no offer of any kind has been made by the other side to maintain them.

[They were then stopped.]

(1) 2 Russ. 1.
(2) Jac. 245.
(3) Kay, 308.
(4) 47 L. T. (N.S.) 283.

C. A.
1883
In re AGAR-ELLIS.
AGAR-ELLIS *v.* LASCELLES.

Higgins, in reply:—

The Court will now in every case consider what is for the benefit of its ward. We ask the Court to see the young lady.

[Their Lordships dissented from the proposal.]

Then if the father will really withdraw his maintenance, the mother is now in a position to maintain them and will undertake to do so.

BRETT, M.R.:—

In this case the husband and wife are of different religious persuasions. The father is a Protestant and the mother is a Roman Catholic. They have children: among others, the daughter who is in question in this case. After many and bitter controversies with regard to the education of the children, as to which religious persuasion they should be brought up in—at all events after strong expressions of the feelings of this child—the father consented that the child should follow the religious doctrine of her mother and of which she so approved. But the father, insisting upon his right, did not allow this daughter to live with her mother, and has put her into many and various places to live. At last he has put her to live under the protection of a lady who is called Madame *Guerini*. This lady is about to proceed abroad for a few weeks, probably for the purpose of seeing her own relatives and friends. Of course she cannot take this young lady with her; and thereupon the mother and the daughter, after requesting that this young lady, who is nearly seventeen, might for those few months live with her mother—not always, but for those few weeks of this year, and stay with her mother until the return of this Madame *Guerini* to *England*, and after having been refused, have petitioned this Court, asking this Court to make an order that this young lady shall be allowed, notwithstanding her father's objection, to stay with her mother for some weeks to be named by the Court, during the absence of this other lady; and they have stated as facts, that the father, although he has not forbidden correspondence between the mother and daughter, has insisted that every letter written by the daughter should be shewn to a person nominated by him; and that every letter

received from the mother by her daughter should be read by the person nominated by him—such person being no relation either to the mother or the daughter; and they have asked for an order that free access may be had between the mother and the daughter; and that the correspondence may be free—the meaning of those two applications being that, whereas the father has allowed the mother to see the daughter once a month while the girl was younger, the girl and her mother now wish to see each other whenever they please, not at the mother's house, but at the place where the father has appointed the child to live. That has been refused by the father, and they request the Court to make an order that they may have that freedom of access, and they have petitioned the Court that their correspondence may be free and not subject to that strange control put upon it by the father.

It was proposed by the Court yesterday that the Court should not interfere with the visit to the mother, but that the father should allow, not access whenever the daughter and the mother wished it, but once a fortnight instead of once a month, and that the correspondence between the mother and the daughter should not be subject to this supervision. But both these modifications are refused by the father. He refuses, therefore, to allow his daughter to pay a visit to her mother; he refuses to allow his daughter to see her mother more than once a month; he refuses to allow his daughter and her mother to correspond, except upon the condition that the letters are shewn to himself or third parties. And we are told that this is done for fear that the affection of his daughter towards him should be altered. However, the petition is brought before the Court, and it has been argued on behalf of the mother and daughter that because the daughter is now more than sixteen, the father has no right to the control or custody over her; that she is emancipated from his control; and that the Court ought so to declare. In support of that argument it was said that the authorities shew that where a girl over sixteen is absent from her father and with other people, the Court, upon a *habeas corpus* sued out by the father, will see the girl who is above sixteen and ascertain her view of the position, and if she is content to remain where she is, will not grant to the father upon the *habeas corpus* a return of the child into his

C. A. 1883 *In re* AGAR-ELLIS. AGAR-ELLIS *v.* LASCELLES. Brett, M.R.

custody. And it is said that that shews that the law is that when a girl is over sixteen her father has no longer any control over her. It was said further, that this was shewn to be the law, because the Court in the case of a testamentary guardian will, if necessary, interfere with regard to his mode of exercising the control which is given to him by law. Now I cannot accede to the argument thus put forward. It seems to me to be directly contrary to the law of *England*, which is, that the father has the control over the person, education, and conduct of his children until they are twenty-one years of age. That is the law. If a child is taken away from the father, or if a child leaves the father and is under the control of, or with, other people, then the application for a *habeas corpus* is no part of the law of equity as distinguished from the Common Law of *England*. It is the universal law of *England* that if any one person alleges that another is under illegal control by anybody, that person, whoever it may be, may apply for a *habeas corpus*, and thereupon the person under whose supposed control, or in whose custody, the person is alleged to be illegally and without his consent, is brought before the Court. But the question before the Court upon *habeas corpus* is whether the person is in illegal custody without that person's consent. Now up to a certain age children cannot consent or withhold consent. They can object or they can submit. But they cannot consent. Because the Court cannot inquire into every particular case, the law has now fixed upon certain ages—as to boys the age of fourteen, and as to girls the age of sixteen—up to which, as a general rule, the Court will not inquire upon a *habeas corpus*, as between the father and the child, as to the consent of the child to the place, wherever it may be. But above the age of fourteen in the case of a boy, and above the age of sixteen in the case of a girl, the Court will inquire whether the child consents to be where it is; and if the Court finds that the infant, no longer a child, but capable of consenting or not consenting, is consenting to the place where it is, then the very ground of an application for a *habeas corpus* falls away. I say, if it is the father who applies for the *habeas corpus* the *habeas corpus* is not granted. That seems to me to have been the rule, whether the *habeas corpus* was applied for to a Judge of the Court

of Equity, or to a Judge of a Court of Common Law. All Judges had the duty of listening to such applications; and, when they had such an application for a *habeas corpus*, to my mind it is clear that they administered the same law, and, therefore, I cannot assent to the view which was suggested by Mr. *Davey*, that some alteration has been made by the *Judicature Act* in the rules to be observed upon an application for a *habeas corpus*. The law was administered in the same way by a Chancery Judge as by a Common Law Judge. Therefore, of course, the rules of equity, or the principles of equity as they are called, are not to prevail, because there is nothing for them to prevail over. The cases of *habeas corpus*, therefore, do not at all apply to the proposition for which they were cited. In the present case they are, of course, inapplicable, because the child is not away from her father —the child is under the control of her father; and this application is not for a *habeas corpus* by the father to restore the child, but the application is for an order of the Court to be made against the father. Those cases, therefore, seem to have no application.

Now we have to deal with the cases of the testamentary guardian. It is impossible that a testamentary guardian can be the same as a father. A testamentary guardian is a creature of the law, and nature has nothing to do with it. But the law of *England* has recognised the natural rights of a father, not as guardian of his children but as the father, because he is the father. The rights of a father as guardian, if they could be limited to his rights as guardian, would probably be the same as the rights of a testamentary guardian; but the father has greater rights than those which a testamentary guardian, or any other guardian, can have. A testamentary guardian is not called on to feel affection for his ward; he is not called upon to forgive the ward; he is not called upon to treat the ward with tenderness. The law recognises the rights of the father because it recognises the natural duties of the father. Now the natural duties of a father are to treat his child with the utmost affection and with infinite tenderness, to forgive his child without stint and under all circumstances. None of those duties are expected of a testamentary guardian, but they are the natural duties of a father, which, if he breaks, he breaks from all that nature calls upon him to do; and

C. A. 1883

In re AGAR-ELLIS. AGAR-ELLIS *v.* LASCELLES.

Brett, M.R.

if he breaks from these duties, the law may not be able to insist upon their full performance. The law cannot inquire in every case how fathers have fulfilled their duties. The law does not interfere because of the great trust and faith it has in the natural affection of the father to perform his duties, and therefore gives him corresponding rights. Therefore, any decision on the question of a testamentary guardian cannot affect the question when it comes to be a question between the rights and duties of a father to his child. But there are limits to the forbearance and patience of the law in particular cases, which have been already referred to in argument. If, for instance, a father by his immoral conduct has become a person who really is unfit in the eyes of everybody to perform his duties to his child, and, therefore, to claim the rights of a father towards his child, the Court then will interfere. That is, if the child be a ward of Court; for unless the child be a ward of Court, the Court has no greater jurisdiction as between the father and child than it has between any other persons. But if the child be a ward of Court, and if the father has been guilty of that amount of immorality which convinces the Court that he is not fit to claim his rights as a father, the Court will, at the instance of the ward, interfere. And so, if the father has allowed certain things to be done, and then, out of mere caprice, has counter-ordered them, so as, in the eyes of everybody, to cause an injury to the child, then the Court will not allow the capricious change of mind, although if the thing had been done originally the Court could not have interfered. I am not prepared to say that the patience of the Court, in the case of its ward, might not be exhausted by other conduct of the father—by cruelty to a great extent, or pitiless spitefulness to a great extent. I am not prepared to say the Court would not interfere in such a case, although no Court has yet decided it, but the Court could not interfere on such grounds as that except in the utmost need and in the most extreme case. I adopt myself the expression of the rule of the conduct of the Court as between father and child as laid down by Vice-Chancellor *Bacon* in the case of *Re Plomley* (1). I do not mean to say it is not as strongly and clearly expressed in other cases, but that seems to

(1) 47 L. T. (N.S.) 284.

be one of the latest, and I cannot see that it is possible to lay down the rule more clearly. He says, "Appeals have been made to the principles of the law which have been settled for centuries. Those principles have never been called into question. One of those principles (and it is the prominent one) is that this Court, whatever be its authority or jurisdiction, has no right to interfere with the sacred right of a father over his own children." It seems to me that in that word "sacred" the Vice-Chancellor has summed-up all that I have endeavoured to express. The rights of a testamentary guardian, or any other legal guardian, are legal rights. The rights of a father are sacred rights because his duties are sacred duties. It seems to me that in this case there is no charge of immorality of conduct which can authorize the Court to interfere between this father and his child. There is no such change of mind before the Court at present as would authorize the Court to interfere on that ground. If it had been stated here, or if it had been shewn, that any part of that which the father insists upon here was done for the purpose of exercising any further pressure upon his daughter as to her religion, I should have thought that that would have shewn that capricious change of mind in this case which would have called upon the Court to interfere and to stop it forthwith. But it is not alleged in this petition that this strange insistance of the father for the purpose of preserving the affection of his child, is done for the purpose of exercising any pressure as to her religion. It is not so stated, however strange it appears to me that the father in this case should have insisted on the things which I have mentioned. It is a matter which, judicially, the Court cannot further inquire into. The Court must act upon the general rule, and say that, on account of the general trust which the law reposes in the natural affection of a father, this case is not brought within any of the rules which authorize the Court to interfere; and, therefore, that this petition must be dismissed.

COTTON, L.J.:—

This is an appeal on a petition presented by an infant, one of the Plaintiffs in the suit, and by the mother of that infant, asking that the infant may have a larger opportunity of seeing her

C. A. 1883

In re AGAR-ELLIS. AGAR-ELLIS *v.* LASCELLES.

Cotton, L.J.

mother and may spend part of her holidays with her, and also asking for unrestricted means of communicating by letter. This petition is headed in the matter of the Act of 36 & 37 Vict. c. 12, and I mention that because it might be considered that the petition really did get some force, or the Court got some authority, from that Act, but it is admitted, and it is an undoubted fact, that the young lady is above the age of sixteen, and that Act, therefore, has no bearing at all upon the matter. The authority given to the Court of Chancery by that Act merely relating to infants under sixteen, that Act must be dismissed altogether from consideration. Then we come to the question whether, independently of that Act, this Court will grant the prayer of the petition. Now the first question which was raised is this: Does the fact that the young lady is above sixteen make any difference as regards the duty of the Court in interfering on her behalf? It was put by Mr. *Higgins* as high as this—that when an infant is over sixteen the father has no right to the custody of it. He did not deal, nor did Mr. *Joyce*, with the Act 12 Car. 2, c. 24, which gives the father the power of appointing a testamentary guardian. Sect. 8 of that Act gives to fathers power by a will, or by a deed, to dispose of the custody and tuition of his child or children for and during such time as he or they shall respectively remain under the age of twenty-one years or any lesser time. That Act authorizes the father to delegate to others the custody and tuition of his children until they are twenty-one. Nothing can, in my opinion, be a clearer declaration of the law that the father himself, when living, has the right to the custody and tuition of his children whilst they are under the age of twenty-one years. But certain cases were cited by Mr. *Higgins* in support of his contention. They were cases principally, if not entirely, of *habeas corpus;* but it is remarkable that in one of the cases to which he referred, *Reg.* v. *Howes*, although there is a passage in the judgment of Lord Chief Justice *Cockburn* on which he relied on another point, there is this passage also (1): "Now the cases which have been decided on this subject show that although a father is entitled to the custody of his children till they attain the age of twenty-one, this Court will not grant a *habeas corpus* to hand a child which is

(1) 3 E. & E. 336.

below that age over to its father provided it has attained an age of sufficient discretion to enable it to exercise a wise choice for its own interests." Therefore the Lord Chief Justice there most distinctly recognises what, having regard to the Act, I should have thought was beyond dispute, that during infancy and over sixteen the right of the father still continues.

But then there are cases where undoubtedly the Court declined to interfere on *habeas corpus* in order to hand the child over to the father or to interfere with it when it was of the age of discretion—the age of sixteen in the case of girls and the age of fourteen in the case of boys. For what reason is that? When an infant is so young as not to be able in the eyes of the law to exercise a discretion, then unless that infant is in the proper custody, that is to say, the legal custody of the father or the guardian appointed, it is not in legal custody, and the very object of suing out a *habeas corpus* is to have it ascertained whether the person who is sought to be brought up is under duress or imprisonment; but nobody can be placed in the position of being under duress or imprisonment if he expresses a wish to remain where he is at the time the writ is issued, that is to say, provided the person is competent to express such a wish; and if he does, it is the duty of the law to regard it. When the child is so young as not to be able to express its wish, if it is not in that which is the legal custody, it must be considered as under duress or imprisonment and in illegal custody, and, therefore, the Court will grant a *habeas corpus* and have the child brought from the custody where it is, when it is not of an age to express a wish in such a way as that the law can attend to it. That, in my opinion, entirely displaces all those cases which have been referred to by Mr. *Higgins* as regards the refusal of the Court on a writ of *habeas corpus* to deliver over a child when it has arrived at years of discretion to its father.

Then what we have to consider is, whether the Court will interfere with the discretion of the father. Now, for my own part, I must express my regret that the suggestion thrown out by the Court yesterday was not acceded to by the father. I can hardly conceive circumstances where a daughter should not have the opportunity of visiting, under any restrictions which

C. A. 1883

In re AGAR-ELLIS. AGAR-ELLIS *v.* LASCELLES.

Cotton, L.J.

may be necessary, and of corresponding with, her mother. I should think that that would, almost as an unexceptional rule, be of the greatest possible advantage to the infant. But the father takes a different view of the case, and the question which we have to consider is whether the Court ought to interfere with the discretion of the father and to say what it would think best for the infant. Here we are not in any way dealing with the jurisdiction of the Court under *habeas corpus*, we are considering the jurisdiction which the Court of Chancery has always exercised, delegated probably from the Crown as *parens patriæ*. The Court does not exercise its jurisdiction except when either there is money paid into Court under the *Trustee Relief Act*, and for this purpose £100 is held sufficient, or a suit is instituted to administer the trusts of money settled on the infant, not because the jurisdiction does not exist but because the Court will not interfere as regards the custody and tuition of the children, where it has not the means of providing for them. That is, the jurisdiction is not exercised unless the infant is made what is called a ward of Court, either by being party to an action to administer the trusts of money, or being interested in money paid into Court under the *Trustee Relief Act*. Here in my opinion the circumstances are not such as, having regard to the principles on which the Court has acted in exercising that jurisdiction, to justify the Court in interfering with the discretion of the father. I do not say that the Court has no jurisdiction. The Court has jurisdiction to consider whether the father has acted in such a way as will justify the Court in interfering with his paternal authority. It is a question whether, on the principles upon which the Court has always acted, and which have been laid down for centuries, the Court ought to exercise its jurisdiction by interfering with the discretion of the father. Some cases were referred to by Mr. *Higgins* as to testamentary guardians. In my opinion those cases have no bearing on the question which we have to consider. The testamentary guardian stands in an entirely different position. The right given to him is the right of tuition and custody under the Act of Parliament. It is given to him as a trust to be exercised, and the Court will interfere with his discretion in exercising that trust in a way in which it never will interfere with the discretion

of a father. In this case when it was before the Court on a former occasion I find Lord Justice *James* (1), referring to the case of *Stourton* v. *Stourton*, says (2): "But that case was the case of a testamentary guardian, a case of mere and pure trust which is essentially under the jurisdiction of the Court and under a jurisdiction always exercised with the widest judicial discretion." These cases, therefore, may be disregarded. Now what circumstances do justify the interference of the Court with the rights and duties of a father? In one way the Court does interfere, undoubtedly, whenever an infant is made a ward of Court, that is to say, it prevents the father (and that is an interference with some portion of his rights) from taking the infant out of the jurisdiction. The Court will not allow the father to withdraw the ward from the jurisdiction to prevent the Court from exercising jurisdiction if the circumstances are such as to justify the Court in doing so. But that is a very different thing from interfering with the discretion of the father as regards the tuition and custody of the child within the jurisdiction, where the Court can ascertain whether it is exercised or not exercised in such a way as that the Court should interfere. I will not say there are no other cases than those I have mentioned, but those which have been brought before the Court are those where the father by his conduct has shewn that he is entirely unfit in any respect to exercise his parental authority and duties as regards his children. Here there is nothing of the kind. There is another thing in this case which has been already dealt with by the Court before. The father, although not unfitted to discharge the duties of a father, may have acted in such a way as to preclude himself in a particular instance from insisting on rights he would otherwise have; as where a father has allowed, in consequence of money being left to a child, the child to live with a relative and be brought up in a way not suited to its former station in life or to the means of the father. There the Court says you have allowed that to be done, and to alter that would be such an injury to the child that you have precluded yourself from exercising your power as a father in that particular respect, and then the Court interferes to prevent the father from having the custody of the child, not because he is immoral or has

(1) 10 Ch. D. 74. (2) 8 D. M. & G. 760.

C. A. 1883

In re AGAR-ELLIS. AGAR-ELLIS *v.* LASCELLES.

Cotton, L.J.

forfeited all his rights, but because in that particular instance he has so acted as to preclude himself from insisting on what otherwise would be his right. That was the case in *Lyons* v. *Blenkin* (1) which has been cited. Then what else is there in the case? I quite agree with the Master of the Rolls that I would in no way limit the hand of the Court or say that where there are cases of cruelty to a child the Court would not interfere. But nothing of that sort I think can be successfully suggested in this case in such a way as to justify the Court in interfering in this case.

That being so, what is the result? It is not in our power to go into the question as to what we think is for the benefit of this ward. The father has not in my opinion forfeited his right to exercise his duties as a father, and we ought not to interfere. It has been said that we ought to consider the interest of the ward. Undoubtedly. But this Court holds this principle—that when, by birth, a child is subject to a father, it is for the general interest of families, and for the general interest of children, and really for the interest of the particular infant, that the Court should not, except in very extreme cases, interfere with the discretion of the father, but leave to him the responsibility of exercising that power which nature has given him by the birth of the child. In my opinion we should be breaking through the principle on which this Court has so long acted if we were to be persuaded by any argument addressed to us to interfere in this case and take upon ourselves the duties which the father has to exercise.

BOWEN, L.J.:—

In this case the infant, who is a girl over the age of sixteen, who is being maintained by her father and is in the custody of her father, has in conjunction with her mother asked the Court to interfere with the directions which her father has given as to the place in which she should spend her vacation, and as to the mode in which her mother's access to her should be limited and confined. This is a case in which, if we were not in a Court of Law, but in a court of critics capable of being moved by

(1) Jac. 245.

feelings of favour or disfavour, we might be tempted to comment, with more or less severity, upon the way in which, so far as we have heard the story, the father has exercised his parental right. But it seems to me the Court must not allow itself to drift out of the proper course; the Court must not be tempted to interfere with the natural order and course of family life, the very basis of which is the authority of the father, except it be in those special cases in which the state is called upon, for reasons of urgency, to set aside the parental authority and to intervene for itself. I for one should deeply regret the day, if it ever came, when Courts of Law or Equity thought themselves justified in interfering more than is strictly necessary with the private affairs of the people of this country. Both as regards the conduct of private affairs, and of domestic life, the rule is that Courts of Law should not intervene except upon occasion. It is far better that people should be left free, and I do not believe that a Court of Law can bring up a child as successfully as a father, even if the father was exercising his discretion as regards the child in a way which critics might condemn. Now a good deal of this discussion has turned upon the exact limits of parental authority. As far as one can see, some little confusion has been caused by the use in earlier law books of distinctions by which the law now no longer strictly stands. The strict Common Law gave to the father the guardianship of his children during the age of nurture and until the age of discretion. The limit was fixed at fourteen years in the case of a boy, and sixteen years in the case of a girl; but beyond this, except in the case of the heir apparent, if one is to take the strict terminology of the older law, the father had no actual guardianship except only in the case of the heir apparent, in which case he was guardian by nature till twenty-one. That was what was called guardianship by nature in strict law. But for a great number of years the term "guardian by nature" has not been confined, so far as the father is concerned, to the case of heirs apparent, but has been used on the contrary to denote that sort of guardianship which the ordinary law of nature entrusts to the father till the age of infancy has completely passed and gone.

I do not desire to elaborate the matter more than is necessary

C. A. 1883 *In re* AGAR-ELLIS. AGAR-ELLIS *v.* LASCELLES. Bowen, L.J.

The history I think of the term "natural guardianship" and of its extension, more especially in Courts of Equity, to the father's natural custody and to the authority which a father has over his child up to the complete age of twenty-one, will be found in *Hargreave's* note to *Coke* (1). There is, therefore, a natural paternal jurisdiction between the age of discretion and the age of twenty-one, which the law will recognise. It has not only been recognised by the Common Law and by the Court of Chancery but it has also been recognised by statute. The Act of 12 Car. 2 enables the father by his will to dispose of the custody and tuition of his child or children until they attain the age of twenty-one years. It seems to me to follow that if a father can dispose of the custody and tuition of his children by will until the age of twenty-one, it must be because the law recognises, to some extent, that he has himself an authority over the children till that age is reached. To neglect the natural jurisdiction of the father over the child until the age of twenty-one would be really to set aside the whole course and order of nature, and it seems to me it would disturb the very foundation of family life.

We have been pressed by Mr. *Higgins* with a certain class of cases in which, upon *habeas corpus*, the Courts refused, after the age of discretion had been reached, to restore to the father the child who had escaped beyond his control. In all those cases it was a question of restoring by force to the father the child who has escaped voluntarily and elected to remain beyond his custody. The reason why the Court in those cases refused to restore the child to the custody of the father has been pointed out to be that the writ of *habeas corpus* is really a writ affecting the liberty of the person, and if the child is free he cannot on such an application be handed over to the custody of the applicant. The Master of the Rolls has, I think, hit the exact distinction which applies to that class of authorities, and which will be found in a note to the case of *Ex parte Hopkins* (2). The annotator says: "If the parties brought up thereon will acquaint the Court that they are under no force the Court will let them go back to the places from whence they came, or if they appear to be under restraint will set them at liberty, but not deliver them into the custody of

(1) Co. Lit. 88 b. (2) 3 P. Wms. 155.

another, nor in a proceeding of that nature, determine private rights, as the right of guardianship evidently is."

Now, with regard to the cases of testamentary guardians, which have also been pressed upon us, the distinction is equally obvious. The testamentary guardian is only entitled to exercise, by way of trust, control over the custody and tuition of the infant, and I agree in what has been said as to that by the other members of the Court. When we come to the case of wards and the special jurisdiction exercised by the Court of Chancery over infants who have been brought within its protection, as is the case with this particular young lady, it seems to me to be essential to remember that the Court, even in the case of its wards, will not disregard the usual course of nature. How can one imagine any opposite view being taken? Fancy the position of a child, with its father living, which the Court endeavours to bring up by judicial machinery, instead of leaving it to be brought up by parental care. Judicial machinery is quite inadequate to the task of educating children in this country. It can correct abuses and it can interfere to redress the parental caprice, and it does interfere when the natural guardian of the child ceases to be the natural guardian, and shews by his conduct that he has become an unnatural guardian, but to interfere further would be to ignore the one principle which is the most fundamental of all in the history of mankind, and owing to the full play of which man has become what he is.

Now the Court must never forget, and will never forget, first of all, the rights of family life, which are sacred. I think all that could be said on that subject has been said far better than I could repeat it by Vice-Chancellor *Kindersley* in the case of *In re Curtis* (1), and the cases to which he there refers. Those are as to the rights of family life. Then we must regard the benefit of the infant; but then it must be remembered that if the words "benefit of the infant" are used in any but the accurate sense it would be a fallacious test to apply to the way the Court exercises its jurisdiction over the infant by way of interference with the father. It is not the benefit to the infant as conceived by the Court, but it must be the benefit to the infant

(1) 28 L. J. (Ch.) 458.

C. A. 1883 *In re* AGAR-ELLIS. AGAR-ELLIS *v.* LASCELLES. Bowen, L.J.

having regard to the natural law which points out that the father knows far better as a rule what is good for his children than a Court of Justice can. Now above sixteen it appears to me, as below sixteen, the Court can only interfere with the father for a sufficient reason. When you come to a child above the age of sixteen the Court ought only to interfere with the father's discretion upon the same lines, so to speak, as it would interfere below sixteen. Of course there are exceptions and circumstances differ. A child below sixteen requires very different treatment at home to a child above sixteen, and the conduct of a father which might be tolerated in the case of the one might be perfectly intolerable in the case of the other. But still the father has the natural authority. Except in cases of immorality, or where he is clearly not exercising a discretion at all, but a wicked or cruel caprice, or where he is endeavouring to withdraw from the protection of the Court, which is entrusted with such protection by law, the custody of the infant, as a rule this Court does not and cannot interfere, because it cannot do so successfully, or I should rather say because it cannot do so with the certainty that its doing so would not be attended with far greater injury both to the infant itself and also to general social life. I believe that the Court has jurisdiction, but it must exercise it with sufficient reason. As the Master of the Rolls said, the interference of the Court may be certainly invoked by reason of other circumstances than those which have been laid down in the classification to which he has alluded. As soon as it becomes obvious that the rights of the family are being abused to the detriment of the interests of the infant, then the father shews that he is no longer the natural guardian—that he has become an unnatural guardian—that he has perverted the ties of nature for the purpose of injustice and cruelty. When that case arrives the Court will not stay its hand; but until that case arrives it is not mere disagreement with the view taken by the father of his rights and the interests of his infant that can justify the Court in interfering. If that were not so we might be interfering all day and with every family. I have no doubt that there are very few families in the country in which fathers do not, at some time or other, make mistakes, and there are very few families in which a wiser

person than the father might not do something better for that child than is being done by the father, who however has an authority which never ought to be slighted.

Solicitors for Petitioners: *Harting, Son, & Ellis.*
Solicitors for Respondent: *Bowlings, Foyer, & Hordern.*

M. W.

Ex parte HELDER. *In re* LEWIS.

Act of Bankruptcy—Fraudulent Transfer of Property—Payment by Agent—Liability of Agent to Trustee in Bankruptcy of Principal—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 6, *sub-s.* 2.

An agent, who, in obedience to the previous direction of his principal, pays away money of the principal which is in his hands, knowing before he makes the payment (though he did not know when he received the money) that the payment will when completed constitute an act of bankruptcy on the part of the principal, is not liable to the trustee in the subsequent bankruptcy of the principal for the money so paid away.

The trustee could recover the money from the agent only on the ground that he had paid away the money of the trustee, and in such a case the money would become the trustee's money only on the completion of the act of bankruptcy to which his title would relate back, *i.e.*, not until after the money had left the agent's hands.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

John Lewis carried on the business of a draper. In July, 1882, he was indebted to his father in the sum of £400 for advances made to him, to secure which he had deposited with the father the lease of his shop, and he was indebted to his wife's uncle in the sum of £130. On the 22nd of July, 1882, Messrs. *Helder, Roberts, & Gillett*, solicitors, by the instructions of the father, served *Lewis* with a writ for £427 9*s.* (being the £400 with interest), and on the 17th of August, 1882, the same solicitors, by the instructions of the uncle, served *Lewis* with a writ for £131 0*s.* 7*d.* (being the £130 with interest). *Lewis* shortly afterwards had some interviews with Mr. *Roberts*, and it was ultimately arranged that judgment by default should be signed in both the actions, but that execution should be delayed in order that *Lewis* should

C. A. 1883

Ex parte HELDER. *In re* LEWIS.

effect a sale of his lease, and of his stock-in-trade, and the good-will of his business, for the purpose of paying the judgment debts out of the proceeds of sale, and he instructed *Roberts* to carry out the sale. The property was accordingly sold to a Mr. *Mattey*, and the purchase-money, amounting, after some deductions, to £599 7*s.* 4*d.*, was, on the 30th of August, 1882, received by *Roberts*. Out of this sum *Roberts*, by the direction of *Lewis*, made the following payments: £436 8*s.* 2*d.* to the father; £85 0*s.* 5*d.* to the uncle; £44 6*s.* to a brother of *Lewis* who had been in his employment as a shopman, and who claimed that sum as due to him for arrears of salary; and several other small payments amounting together to £17 1*s.* 1*d.*; and *Roberts* retained for his firm £16 11*s.* 8*d.* for the costs of conducting the sale. The property thus sold was in fact (with a very trifling exception) the whole of *Lewis's* property, and he had a number of trade creditors, to meet whose claims there was nothing left after the above payments had been made. On the 28th of October, 1882, *Lewis* was adjudicated a bankrupt, and upon the application of the trustee in the bankruptcy the Registrar made an order declaring that the payment, delivery, or transfer of the £599 7*s.* 4*d.* to *Roberts* on the 30th of August was fraudulent, and an act of bankruptcy, and void as against the trustee, and that the trustee was entitled to that sum, after deducting the sum of £17 1*s.* 1*d.*, the amount of the small payments above referred to. And the Registrar ordered that the father, the uncle, and the brother should respectively pay to the trustee the sums which *Roberts* had paid to them respectively, and that the firm of *Helder, Roberts, & Gillett* should pay to the trustee the sum of £582 6*s.* 3*d.*, the amount of the three payments to the father, the uncle, and the brother, and of the sum retained by *Roberts* for costs.

Helder & Co. appealed.

Upon the evidence the Court of Appeal held that before *Roberts* actually made the payments in question, in accordance with the previous directions given to him by the bankrupt, he had become aware that the proceeds of the sale were in substance the whole of the bankrupt's property, and that he was in insolvent circumstances, though *Roberts* did not know these facts when he

received the directions. It appeared from the evidence that the payment of £44 6*s.* to the bankrupt's brother was in fact made by *Roberts* before the payments to the father and the uncle. *Roberts* deposed that the arrangement for the division of the money was not made till after it had been received by him.

Cooper Willis, Q.C., and *F. Cooper Willis*, for the Appellants:—

The transaction was a *bonâ fide* one so far as *Roberts* was concerned. The money did not become the money of *Lewis* until it was received by *Roberts* as his agent, and when *Roberts* had received it his duty as agent was to pay it away according to the directions of his principal, or to hand it over to his principal. His principal could have sued him for it. At any rate *Roberts* ought not to have been disallowed his costs of carrying out the sale. There is no evidence of any fraudulent conspiracy, nor is it shewn that *Roberts* had notice of any act of bankruptcy or of any fraudulent preference by *Lewis*. If *Roberts* knew that the application of the money in the way directed by *Lewis* would amount to a voluntary preference or to an act of bankruptcy on the part of *Lewis*, still he would not be liable to the trustee for the money so paid away: *Ex parte Stubbins* (1).

Winslow, Q.C., and *J. Brooke Little*, for the trustee:—

Roberts received the money as agent for all the parties. But, if he was acting as agent for the debtor only, still he received the money with notice of an agreement by the debtor to commit an act of bankruptcy by transferring what was in substance the whole of his property to a few favoured creditors.

[COTTON, L.J.:—Must not the transfer be made to some one who is not the debtor's agent?]

It was not intended that the money should ever go into the debtor's own hands; it was to go to the creditors for whom *Roberts* was acting.

The payment to the brother, which was made first, was a fraudulent preference and an act of bankruptcy, and *Roberts* had notice of it before he made the payments to the father and the uncle.

(1) 17 Ch. D. 58.

C. A.
1883
Ex parte HELDER.
In re LEWIS.

Willis, in reply:—

If there was any fraudulent preference there is nothing to shew that *Roberts* had any notice of it. And he was a mere agent, like a banker who is bound to pay his customer's cheque even if it is for the whole of his balance.

BRETT, M.R.:—

We all think that when *Roberts* received the purchase-money from the purchaser he received it as agent for the debtor, and that when he received instructions from the debtor as to the disposition of the money he had no reason to doubt the propriety of those instructions. We think, however, that before he actually paid over the money he had become aware that the payment of it in the way in which he had been directed to pay it would, when completed, constitute an act of bankruptcy on the part of the debtor, as being a transfer of the whole of his property to some of his creditors. But *Roberts* in making the payments was only fulfilling that duty as an agent which had been previously imposed on him by the debtor. The money did not become by relation the money of the trustee in the bankruptcy until the act of bankruptcy was completed by the making of the payments. Under such circumstances can it be contended that the agent is liable to the trustee? Is the agent liable because he does an act which he knows would, if done by the principal, be an act of bankruptcy on his part? We think that, even if the payment to the brother was a fraudulent preference, there is not sufficient evidence that *Roberts* knew it.

Winslow, Q.C.:—I do not think I can carry my argument to that extent. I know of no authority for it. There is no act of bankruptcy until the payments are all made.

BRETT, M.R. (after stating the facts), continued:—

Mr. *Roberts* undoubtedly received the purchase-money from the purchaser as agent for the debtor, and the money was, therefore, in effect in the hands of the debtor. The Registrar seems to have held that the receipt of the money by *Roberts* was an act of bankruptcy by the debtor. How the receipt of the money by the

debtor could be an act of bankruptcy I cannot understand. We are of opinion that the receipt of the money by *Roberts* was a receipt by the debtor, and if the Registrar had apprehended that fact he could not have given the judgment which he did give. *Roberts* held the money as a trustee for his principal (the debtor) and subject to his orders, and those orders were to pay it over to the persons to whom he in fact did pay it. It is said that the payment to the debtor's brother was a fraudulent preference and an act of bankruptcy. It seems to me that those who seek to charge the solicitor with the money are bound to shew that the payment was a fraudulent preference. It could only be that if it was made without pressure by the creditor, and to my mind it has not been shewn that it was so made. A request by the creditor for payment would be enough. It does not appear to be settled whether a fraudulent preference is necessarily an act of bankruptcy, but, assuming that it is, it appears to me that the trustee has not discharged the burden of shewing that the payment to the brother was a fraudulent preference, and, if it was, he has not shewn that the solicitor when he made the payment knew that it was a fraudulent preference. There is no evidence that he did. When you are endeavouring to make a man personally liable for money in which he has no beneficial interest, you must prove the case against him very clearly. So that, even if the payment was a wrongful one, it is not shewn that the solicitor knew that it was, and he is protected because he had no notice. There is no pretence for saying that the payments to the father and the uncle which were afterwards made were fraudulent preferences, there was the most urgent pressure on their part. Writs had been issued and judgments signed. But still, if there was a prior act of bankruptcy, those payments would be void as against the trustee, as being payments of his money. I cannot, however, assume in the absence of proof that the payment to the brother was either a fraudulent preference or an act of bankruptcy.

The solicitor, then, received instructions from the debtor to pay away the whole of the money which he had in his hands to certain specified persons. At the time when he received those instructions he had no knowledge that that which he was instructed to do would, when it was done, be an act of bankruptcy on the part

C. A. 1883 *Ex parte* HELDER. *In re* LEWIS. Brett, M.R.

of his principal. But, before he actually fulfilled his instructions, he did know that if he paid away the whole of the money the payment would be an act of bankruptcy—a *cessio bonorum*—on the part of his principal. It would not, however, be an act of bankruptcy until the payment was completed; there would not be a *cessio bonorum* until all the property was ceded. It being, then, the solicitor's duty as an agent to obey his principal, he finds that, if he does obey him, the payment which he makes will be an act of bankruptcy on the part of his principal. Will this discovery authorize him to break his contract as agent, or make him liable to the trustee in his principal's bankruptcy if he does not break it? The trustee must be able to say, You have done an unlawful act as against me; you have dealt with my money. The agent's answer is, It never became your money till all my functions had ceased; you may perhaps be able to claim the money from some one else, but I never did anything with your money. At the time when I paid the money away it was the debtor's money, and I was acting as his agent. The payment may be an act of bankruptcy on his part, but in fulfilling my duty as his agent I was dealing with his money, not with yours. It appears to me that on this ground—that the money did not become the trustee's money until the payment had been completed—Mr. *Roberts* is not liable to the trustee, and as against him and his firm the Registrar's order must be discharged.

COTTON, L.J.:—

Upon the evidence I think it is clear that Mr. *Roberts* received the purchase-money as agent, not for the father and the uncle, but for the debtor, and consequently the ground of the Registrar's decision fails. Can the decision be supported on any other ground? It is said that after he had received the money Mr. *Roberts* had notice of an act of bankruptcy committed by the debtor, and I think it does appear from the evidence that the payment to the brother was made before those to the father and the uncle. But was the payment to the brother an act of bankruptcy? It is for those who say that it was to prove it, and I have heard no evidence which satisfies me that it was, and certainly, if it was an act of bankruptcy, there is no evidence that

Mr. *Roberts* knew it was. Then, coming to the last ground on which it has been attempted to support the order, at the time when Mr. *Roberts* advised the debtor (as he certainly did advise him) that the money should come into his hands, he did not know that the debtor was in insolvent circumstances or that the money represented the whole of his property. That is the effect of Mr. *Roberts'* evidence, and he has not been contradicted. In my opinion he held the money as agent for the debtor, and he acted upon the orders of the debtor as to the disposal of it while it was still the debtor's money. I think it would be wrong to hold that the agent is liable to the trustee for doing that which he knows will, when it is completed, be an act of bankruptcy on the part of his principal. No authority has been cited for such a decision, and I think it would be wrong so to decide.

BOWEN, L.J. (after expressing an opinion that Mr. *Roberts* received the money as agent for the debtor, and that consequently the payment of the money to him could not have been an act of bankruptcy on the part of the debtor, and after dealing with some other points in the case), continued :—

It is said that Mr. *Roberts* knew that the result of the transaction when it was completed would be an act of bankruptcy on the part of his principal. That drives us to consider this question. If an agent receives money for his principal perfectly *bonâ fide*, and then receives instructions from the principal to pay the money away in a manner which he knows will, when the payment is completed, be an act of bankruptcy on the part of the principal, and he makes the payment according to his instructions, is he liable for the money to the trustee in the principal's subsequent bankruptcy? What is the agent to do? He is intrusted by his principal with the money, and then he is told to pay it away in a manner which will constitute an act of bankruptcy by the principal. What is the agent to do? Is he to stay his hand when he discovers that the payment will be an act of bankruptcy? This would paralyze the discharge of the duties of agents. Of course an agent is not bound to commit a fraud. But, on the other hand, the trustee in the principal's bankruptcy can recover from the agent only money which at the time when he parted with it

C. A. 1883 *Ex parte* HELDER. *In re* LEWIS. Bowen, L.J.

was the trustee's money. I think the test is this, was the money the trustee's money at the time when the agent paid it away? In what way could the trustee recover it from the agent? By a proceeding which is equivalent to an action for money had and received by the agent to his use. But, if the act of Mr. *Roberts* in paying the money away was the completion of the act of bankruptcy, the money never became the money of the trustee until after Mr. *Roberts* had parted with it. How, then, could the trustee sue him for it? On all the grounds which I have referred to I think that the decision of the Registrar must be reversed.

Solicitors for Appellants: *G. J. & P. Vanderpump.*
Solicitor for Trustee: *J. N. Mason.*

W. L. C.

Applied. BOYT *v.* BOYT. [1948] 2 All E.R. 436.

C. A. 1883 *July* 27.

SYMONDS *v.* HALLETT.

[1883. S. No. 3176.]

Husband and Wife—House settled to Separate Use of Wife—Proceedings for Judicial Separation—Husband claiming proprietary Right to House—Interim Injunction.

On a marriage a leasehold house was settled upon the usual trusts for the wife for life, for her separate use, and the husband and wife continued to reside in the house. Differences arose between them, they ceased to cohabit, and the wife instituted proceedings for divorce or judicial separation. The husband claimed the right to go to and to use the house when and as he thought fit, not for the purpose of consorting with his wife, but for his own purposes. In an action by the wife against the trustees and her husband claiming administration of the trusts of the settlement and an injunction to restrain the husband from entering the house:—

Held that, under the circumstances, the wife was entitled to an interim injunction.

BY the settlement dated the 6th of June, 1876, and executed on the marriage of the Plaintiff *Jane Symonds*, then *Jane Barclay*, and the Defendant *Thomas E. Symonds*, a leasehold house, the property of *T. E. Symonds*, was vested in three trustees upon the usual trusts for sale and to hold the proceeds of sale upon the trusts of a deed of even date.

By the deed of even date the furniture, plated articles, chattels, and effects in and about the leasehold house were vested in the same three trustees upon trust to permit the Plaintiff to have the sole and separate use and enjoyment thereof during her life independently of the Defendant *T. E. Symonds*, and of his debts, control, and engagements, and after her death upon the trusts therein mentioned. And by the same deed it was declared that the trustees should stand possessed of the proceeds of sale of the leasehold house upon trust to invest the same in manner therein mentioned, and to pay the income of the investments to the Plaintiff during her life for her sole and separate use without power of anticipation and independently of the Defendant *T. E. Symonds*, and of his debts, control, and engagements; and after her death upon the trusts therein mentioned: and it was thereby declared that until sale of the leasehold house the rents and profits thereof should be paid and applied by the trustees to same persons and in the same manner as the income of the trusts investments.

After the marriage the Plaintiff and her husband, the Defendant *T. E. Symonds*, lived together in the leasehold house; but eventually disagreements arose between them, and in July, 1882, the Plaintiff ceased to cohabit with her husband. On the 19th of June, 1883, she filed a petition in the Divorce Court against him for the dissolution of her marriage on the ground of his alleged adultery and cruelty.

On the 5th day of July the Plaintiff commenced this action against her husband and the trustees of the settlement, claiming:—1. The administration of the trusts of the settlement; 2. That the Defendant *T. E. Symonds*, his servants or agents, might be restrained from entering upon or taking or continuing in possession of the leasehold house, and from removing or causing to be removed any of the furniture, plate, plated articles, furniture, chattels, and effects now in or about the same premises; 3. Other relief.

On the 20th of July the Plaintiff moved the Court for an interim injunction in the terms above stated, and in support of the motion deposed that the Defendant *T. E. Symonds* had for about twelve months past practically ceased to reside at the house,

C. A. 1883 SYMONDS v. HALLETT.

but usually stayed there on Thursdays and Fridays, and slept there one night a week; that he had already taken away some of the settled plate, furniture, chattels, and effects, and that she was apprehensive that he would remove some more.

In opposition to the motion the husband denied the removal of any of the settled articles, and further deposed:—"There are in and about the house papers and valuable property of my own besides the property the subject of the said settlement, and I am desirous of continuing to use the said house at such times and in such manner as I think fit. I have never in any way prevented nor do I intend to prevent my wife from using or living in the said house."

Mr. Justice *Chitty* having granted an interim injunction, the Defendant *T. E. Symonds* appealed.

Ince, Q.C., and *Bagnold*, for the Appellant:—

This injunction operates as a judicial separation, but a trust for separate use was never intended to lead to such an effect. There is a distinction between separate estate and separate property. If the effect of the settlement is to give the wife specifically a separate property in the house *quâ* property, so that she is enabled to exclude her husband from coming there, then it follows that the settlement in effect provides for a future separation between the husband and wife and is against public policy, and therefore void: *Cartwright* v. *Cartwright* (1); *St. John* v. *St. John* (2). It is true that injunctions were granted in *Green* v. *Green* (3) and *Wood* v. *Wood* (4); but both those cases are clearly distinguishable. There the husband was seeking to dispose of the settled property, here he only claims the right to be where his wife is. But if they are not distinguishable, then we submit that they were decided on an erroneous principle of law and are against the general current of authority and should be disregarded. *Allen* v. *Walker* (5) may be relied upon; but that case is not in point, and the observations of *Martin*, B. (6), on separate use go too far, and besides had nothing to do with the question then before the

(1) 3 D. M. & G. 982. 17 Jan 884
(2) 11 Ves. 526.
(3) 5 Hare, 400, n.
(4) 19 W. R. 1049.
(5) Law Rep. 5 Ex. 187.
(6) Ibid. 190.

Court. So too, *Taylor* v. *Meads* (1) merely decides the right of the wife's power of alienation over property settled to her separate use.

This deed does not provide that the husband and wife shall live separate, and until that judgment is pronounced by the Divorce Court the husband has by law the right to be where his wife is. The effect of an injunction will be to enforce a personal separation between the husband and the wife, and the Court will not decide such an important question on an interlocutory application. Justice and convenience require that such a question should be left to the trial of the action—especially when proceedings for a separation are pending in the Divorce Court.

Macnaghten, Q.C., and *Alexander*, for the Respondent:—

The claim of the husband, as stated in his affidavit, is a claim to use the house as his own property. He is asserting a proprietary right to the house, and the case is clearly within *Green* v. *Green* (2) and *Wood* v. *Wood* (3), which have remained unquestioned for many years, and have never been doubted by text-writers. There is no distinction between separate estate and separate property, and a wife is entitled to have her separate property protected against her husband. The Court of Chancery in questions of separate use only deals with the rights of the parties as to the property, and not with personal questions between husband and wife. Here the husband is interfering with the wife's enjoyment of her separate property, and having regard to all the circumstances it is a case in which the balance of convenience is in favour of an interlocutory injunction. The husband is not prevented from enjoying the society of his wife, if he wishes for it. He can take and furnish another house and require his wife to come and live there with him.

Ince, in reply:—

Separate use was intended by Courts of Equity to preserve property for the benefit of the wife, but it was never intended to operate so as to interfere with the domestic relations between

(1) 34 L. J. (Ch.) 203. (2) 5 Hare, 400, n.
(3) 19 W. R. 1049.

C. A. 1883 SYMONDS v. HALLETT.

husband and wife. Any contract, therefore, that either directly or indirectly involves a future separation between husband and wife is void as being against public policy. This injunction will have that effect, and therefore ought not to be granted.

BRETT, M.R.:—

In this case it appears to me that the husband is proposing to go to the house not for the purpose of associating or living with his wife as a husband, but for the purpose of using the house as a house for himself. I am unwilling to express any opinion—although it would not be final I know—on the very important question which has been raised before us on such a motion as is now before the Court. I should wish that any expression I have to give on such a matter should be given on an occasion when the decision could be, with all possible formality, at once taken to the House of Lords. I think, therefore, it is more convenient that this injunction should for the present stand as it is.

COTTON, L.J.:—

An interlocutory injunction has been granted in this case by Mr. Justice *Chitty* to restrain the husband of the Plaintiff from entering into, or continuing in possession of, the house in which she is residing, on the ground that it is settled to her separate use. Undoubtedly, in my opinion, the effect of the deed executed on the marriage was that it is settled to her separate use, although the form in which the settlement is made is a trust for sale, and then the proceeds are to be invested, and the dividends paid to her for her life for her separate use.

The question raised here is one of the very utmost importance, and it must not be supposed by my concurring in what is the view of the other members of the Court—that the injunction should not be disturbed—that I look with the slightest favour on the contention of the Plaintiff's counsel that there is a right in the case of a married woman, being entitled to and living in a house settled to her separate use, to come to a Court of Equity to restrain her husband at her will and pleasure from entering there. I shall not decide the question now in any way, because the opinion of the Court, in which I concur, is, that, under the

circumstances of the case, it would not be desirable to discharge this injunction; but in my opinion it will have to be seriously considered whether the separate use, which is the creature of Courts of Equity, entitles a wife to exclude her husband from the place where she is residing, and from coming there to exercise the rights he has as a husband. Undoubtedly Courts of Equity have said that where property is settled to the separate use of a married woman, she is as regards that property to be considered as if she were a *feme sole;* that is so, as regards protecting the property against the interference by the husband, if he wishes to deal with it as his property and to deprive his wife of the property in it, then undoubtedly Courts of Equity will interfere, and it is their duty so to do. But where it is not interference with the property, assuming it is the property of the wife and that the husband has no right to interfere with it *quâ* property, it is a very different thing to say that she, a married woman, can insist on a Court of Equity preventing her husband entering the house. To say that she is a *feme sole* is a mere hypothesis and an imagination, because she has a husband, though as regards property she is to be considered as a *feme sole.* Expressions have been used that she is entitled to be there in all respects as a *feme sole* and to be protected against her husband's acts as if he were a stranger. That is very true as regards the property. But is the husband to be considered a stranger because the property is vested in her for her separate use? That is a point which those who assert that the husband is to be considered a stranger must prove. No doubt it does seem to be the principle of those decisions to which we have been referred; but it is a principle which I do not in any way favour. My view is this, that the separate use was not created by a Court of Equity in any way to enable a wife to prevent the husband from exercising his rights and duties as an husband except by preserving property for her. I concur in the view that this injunction ought not to be discharged, on this ground, that, looking at the circumstances of the case and at the facts which we have before us, and the affidavit of the husband, he cannot be considered as desiring to use or to enter this house as a husband, to enjoy the society of his wife, or to consort with her as his wife. Therefore,

C. A. 1883 SYMONDS v. HALLETT.

although I must not, by concurring in the view that this injunction shall stand, be considered as in any way favouring the view of it which has been urged in the arguments, yet I think that under the circumstances the best course till the hearing of the case, when the matter can be decided, is not to discharge the injunction which has been granted.

BOWEN, L.J.:—

This is an application to reverse the order of Mr. Justice *Chitty*, who has granted an interim injunction to prevent the husband from entering and continuing in possession of the house.

Now I have no doubt about the effect of the deed. Under the deed there is really a settlement of the house to the wife's separate use, but a point has been raised, and a serious point of law it is, whether the effect of such a settlement is to entitle the wife, if she chooses, to prevent her husband from entering the premises in question whilst she is living there. That she can prevent him from interfering with her proprietary rights over the house must I think be admitted; but it is said that the entrance by the husband to visit the wife is not in any sense an interference with such a proprietary right as the Court of Equity recognises in the wife. On that point of law, which has been discussed at length, and upon which Lord Justice *Cotton* has, I will not say expressed an opinion, but has commented, I desire to say nothing. As far as I am concerned, I would rather leave that matter entirely to the hearing. It is a very important point of law. I do not mean to say that I have got no opinion, but I prefer not to express it now.

I think the question we have to decide now resolves itself into this. Here is a husband seeking to enter a house settled to his wife's separate use, and his wife has instituted a suit at the hearing of which will be decided the question whether she has the right to say, "No, you shall not come here," and meanwhile, under the circumstances of the case and until that very important legal matter is decided, what is most convenient and most just to be done to preserve the *status quo* as far as possible without prejudicing the rights on either side? I think upon the whole that the most convenient, and most just, and most wise course is to let

C. A. 1883 SYMONDS v. HALLETT.

the wife enjoy what it is quite clear she has, the house, and to let the injunction stand which prevents the husband from coming there only until the hearing. For this reason: the husband is not really asking for the benefit of the wife's society. He has no wish for that. A divorce suit is pending. I do not say whether it is frivolous or just, but in the divorce suit which is pending he is charged with cruelty and adultery. He cannot therefore wish to go into his wife's house to force his society upon a woman charging him with cruelty and adultery, nor does he so suggest. The true effect of the affidavit, if you look at it, is this, that he complains of not being allowed the proprietary use of the house. Therefore I think it is more convenient under those circumstances, she clearly being entitled to the house, and it being by no means clear that he is entitled to the proprietary right, to let the injunction stand till the hearing.

Solicitors: *Miller & Miller; Simpson, Hammond, & Co.*

M. W.

Ex parte CREDIT COMPANY. *In re* McHENRY.

C. A. 1883 *July* 26; *Aug.* 2.

Liquidation Petition—Appointment of Trustee—Lapse of more than Six Months from filing of Petition—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 6, 125, *sub-s.* 7.

A trustee can be appointed by the creditors under a liquidation petition, though more than six months have elapsed since the filing of the petition.

Ex parte Fenning (1) discussed.

The last clause of sub-sect. 7 of sect. 125, relates only to the effect of the appointment of a trustee under a liquidation after he has been appointed, and does not impose on the making of the appointment any limitation similar to that which by sect. 6 is imposed on the making of an adjudication of bankruptcy, viz., that the act of bankruptcy on which the adjudication is founded must have occurred within six months before the presentation of the petition for adjudication.

THIS was an appeal from two decisions of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

On the 15th of August, 1879, *James McHenry* filed a liquidation petition, and a receiver of his property was appointed. The first

(1) 3 Ch. D. 455.

C. A. 1883 *Ex parte* CREDIT COMPANY. *In re* MCHENRY.

meeting of the creditors was held on the 20th of October, 1879, and was, after repeated adjournments, ultimately adjourned to the 28th of March, 1883. No resolutions for liquidation by arrangement or composition were passed. On the 28th of March the creditors resolved that it was inexpedient that any further proceedings should be taken under the petition, and that application should be made to the Court to discharge the receiver and to dismiss the petition, or to stay all proceedings under it. On the application of some of the creditors, by motion under sub-sect. 12 of sect. 125 of the *Bankruptcy Act*, 1869, the Registrar, on the 3rd of May, 1883, adjudicated the debtor a bankrupt. This adjudication was, on the 30th of June, 1883 (*vide Ex parte McHenry* (1)), discharged by the Court of Appeal on certain terms as to the payment of the debts of the applicants in full. And the Court at the same time ordered that the debtor should within ten days apply to the Court of Bankruptcy for an order that a fresh first meeting of creditors be appointed to be held under the petition. This application was accordingly made, and it was heard by the Registrar on the 10th of July, 1883. The application was opposed by the *Credit Company*, who claimed to prove as creditors of the debtor, but whose proof had not yet been admitted, and at the same time there was heard an application by the *Credit Company*, by motion under sub-sect. 12 of sect. 125, for an adjudication of bankruptcy against the debtor. The Registrar gave the debtor liberty to summon a fresh first meeting of his creditors in lieu of the meeting held on the 20th of October, 1879, and by adjournment from time to time, and he refused to proceed with the further hearing of the motion of the *Credit Company* until after the day to be appointed for the fresh first meeting and the creditors should have come to some resolution. The *Credit Company* appealed.

Winslow, Q.C., and *Sidney Woolf*, for the Appellants :—

The Registrar has exercised no discretion as to the propriety of allowing a fresh first meeting to be held; he treated it as a matter of course, conceiving that this Court had directed that he should order a fresh meeting to be held. But in truth this Court

(1) *Ante*, p. 35.

did not intend to fetter the exercise of his discretion in the matter. There has been great delay, and the proceedings have not been *bonâ fide*. The debtor has not complied with sub-sect. 3 of sect. 125; he has never produced a proper statement of his affairs. The majority of the creditors have not been acting *bonâ fide* in the interest of the creditors. The opinion of the creditors having been once validly taken, a fresh first meeting ought not to be allowed: *Ex parte Solomon* (1).

But the strongest objection to the order is that the proceedings at a fresh meeting must necessarily be wholly futile; the meeting will have no power to appoint a trustee, and without a trustee a liquidation by arrangement cannot proceed. By sub-sect. 7 of sect. 125, the appointment of a trustee in a liquidation is made equivalent to an adjudication in bankruptcy, and by sect. 6 an adjudication of bankruptcy cannot be made "unless the act of bankruptcy on which the adjudication is grounded has occurred within six months before the presentation of the petition for adjudication." Consequently a trustee cannot be effectually appointed under a liquidation petition after more than six months has elapsed since the filing of the petition. The debtor's property would not vest in the trustee: *Ex parte Fenning* (2).

The hearing of our motion for an adjudication ought not to have been postponed; an adjudication was under the circumstances *ex debito justitiæ*.

E. Clarke, Q.C., and *Finlay Knight*, for the debtor.

[COTTON, L.J.:—Do you object to the striking out from the Registrar's order of those words which postpone the hearing of the application for an adjudication until after the creditors shall have passed some resolution at the first meeting?]

Finlay Knight:—No.

[They were not further called upon.]

BRETT, M.R.:—

The first question is, whether, the Registrar having ordered a fresh first meeting to be called, this Court ought to set aside

(1) 20 Ch. D. 281. (2) 3 Ch. D. 455.

C. A. 1883

Ex parte CREDIT COMPANY. *In re* MCHENRY.

Brett, M.R.

his order? It is suggested that he came to that conclusion for wrong reasons, and because he supposed that this Court had ordered him to call a first meeting. That, I think, was not the meaning of the order of this Court, in fact it could not have been the meaning, because if this Court had intended that a fresh first meeting should be called in any event, they would themselves have ordered it then and there, and would not have sent the matter to the Registrar at all. The objection amounts to this, that the Registrar has come to his conclusion for wrong reasons. But you do not appeal against the reasons for a decision, you appeal against the decision itself. The question, therefore, is whether the decision of the Registrar to call a fresh first meeting was wrong. Mr. *Winslow* says it is of no use to order a fresh meeting to be called; that if it is called and it appoints a trustee, the appointment will be either invalid or useless, for that no property of the debtor will vest in him. For this purpose Mr. *Winslow* relies upon sub-sect. 7 of sect. 125, and he says that by reason of that sub-section a trustee in a liquidation cannot be appointed more than six months after the filing of the petition, because an adjudication of bankruptcy cannot be made on a petition presented more than six months after the act of bankruptcy which is relied upon to support it. That raises the question whether the limitation which is placed by sect. 6 on the making of an adjudication of bankruptcy in relation to the date of the act of bankruptcy which is relied upon to support it, is introduced by sub-sect. 7 of sect. 125 into liquidation proceedings so as to make it impossible to appoint a trustee under a liquidation petition more than six months after the filing of the petition. I cannot think that sub-sect. 7 has that effect. Sub-sect. 7 throughout the whole of it, as it seems to me, states what is to be the result, or what are to be the results, of the appointment of a trustee in a liquidation, and does not apply to anything which is to happen before the appointment, or to the making of the appointment. It does not, therefore, introduce any stipulations or conditions upon which a trustee may be appointed, any conditions which are to exist before he is appointed; it only applies to the results which are to happen after he is appointed. If that be true, of course the limitation which is imposed by

sect. 6 upon the making of an adjudication of bankruptcy, in regard to the date of the act of bankruptcy on which the bankruptcy petition is to be founded, has no application to the appointment of a trustee under a liquidation petition.

It is said that *Ex parte Fenning* (1) is contrary to this view of sub-sect. 7. I will not undertake to say strictly what that case did decide, but I do not think it decided what Mr. *Winslow* says it did. At all events, the fact that in that case a Scotch sequestrator had been already appointed is sufficient to support the decision.

Therefore I think this objection fails.

The next objection is this. It is said that the Registrar in the exercise of his discretion ought not to have ordered a fresh first meeting. Well, I think that objection is open, but in this way, that this Court will disagree with the decision of the Registrar if they come to the conclusion that if they had been in his place they would not have granted or ordered a fresh meeting. It is said that the Court would not have done so because of the previous conduct of the creditors who have been engaged in these liquidation proceedings, that their long delay up to this time shews that they have not been honestly doing their duty as creditors, and that, therefore, we ought to infer that they will use delay in the same way hereafter. I do not think that argument holds universally good, that because people have been wicked hitherto you ought to infer that they never will be good. That would be a dangerous maxim in morals. Or, again, to say that because people have once done wrong in business they will never do right again, seems to me a dangerous maxim to introduce into business. However, I think that people who have done wrong in the past had better take to mind this, that they will be watched closely in future. I think that there has been such procrastination in dealing with this liquidation that, if the same creditors have the power to manage anything in the future, they had better take to heart that they will be closely watched by the Court, and that, if there is any undue delay in future, at that very moment and on the very first symptom of it an adjudication of bankruptcy will be made. But I am not prepared to say on the

(1) 3 Ch. D. 455.

C. A. 1883 *Ex parte* CREDIT COMPANY. *In re* MCHENRY. Brett, M.R.

evidence before us that there has been anything like actual fraud in the proceedings. There has been great procrastination which it is very difficult to explain, but that does not shew that there will be the same procrastination in the future. All I can say is that, in my opinion, the future conduct of this matter had better be as expeditious as possible. But I do not think there is any reason for saying that if we had been in the Registrar's place we should not have allowed a fresh first meeting. I think a fresh first first meeting should be called as soon as possible.

That disposes of one appeal.

As to the other appeal, it is said that the Registrar ought not to have adjourned the hearing of the application for an adjudication of bankruptcy. In my view it would have been a strange unbusinesslike way of dealing with this matter if, rightly granting a fresh first meeting, the Registrar had dealt with the question of adjudication before an opportunity of holding the meeting had been given. Therefore, so far from disagreeing with the Registrar as to the adjournment, if he had only adjourned the hearing of the application to that extent I should have agreed with him. But it seems to me that the order is drawn up in a form which might lead to error, that is, an adjournment is ordered until after resolutions have been passed by the creditors. I think the Registrar really meant to direct an adjournment until after the day appointed for the first meeting, if that day should be, in his judgment, appointed within a reasonable time, and the order must be altered accordingly. This is not a material alteration, and I think that in substance the appeal has failed, and the usual result as to costs must follow.

COTTON, L.J.:—

As regards the first appeal, it has been contended that there is no power to order a fresh first meeting to be called, on the ground that, if such a meeting was held, no trustee could be appointed and no property could vest in him for the purpose of administration in the liquidation, and it is said that on the previous occasion we did not decide this point. Most certainly I intended to decide it. I said expressly in *Ex parte McHenry* (1), that, in my

(1) *Ante*, p. 35.

opinion, the Registrar had jurisdiction to order a fresh first meeting, not for the benefit of the debtor, but in order that the creditors might reconsider the resolution which was passed at the meeting on the 28th of March. I then stated the reasons for which I had arrived at that conclusion; and I will say no more about it now, except with reference to *Ex parte Fenning* (1), which is said to be a decision that after the expiration of six months from the filing of a liquidation petition no fresh first meeting can be held, because it cannot pass any effectual resolution. Of course, if there is such a decision, it must be founded on something in the *Bankruptcy Act*. But the Act in no way refers to a fresh first meeting. The power to order a fresh first meeting is one which the Court has in order to enable justice to be done between the debtor and his creditors. The Court has assumed that it has such a power in order that it may duly administer the provisions of the Act. And before we can allow the objection we must be satisfied that, having regard to the true construction of the Act, this power of ordering a fresh meeting is limited to a period of six months from the time of the presentation of the petition.

It is said that sub-sect. 7 of sect. 125 imposes this limitation. Sub-sect. 7 says that in construing the provisions of the Act "the appointment of a trustee under a liquidation shall, according to circumstances, be deemed to be equivalent to and a substitute for the presentation of a petition in bankruptcy, or the service of such petition, or an order of adjudication in bankruptcy." That, I think, means this, that in determining what are the rights of the creditors and of the debtor under a liquidation by arrangement (which assumes that resolutions have been passed) you shall, in applying to a liquidation by arrangement those provisions of the Act which have reference to another state of things, viz., bankruptcy, substitute in those provisions for an adjudication of bankruptcy the appointment of a trustee, in order to see, for instance, what are the rights of creditors who have attempted to obtain a preference, and in other cases, in order to see how provisions which were intended primarily to apply to bankruptcy are to be moulded so as to make them applicable when the circumstances are slightly varied by the fact that there

(1) 3 Ch. D. 455.

C. A. 1883

Ex parte CREDIT COMPANY. *In re* MCHENRY.

Cotton, L.J.

is a liquidation by arrangement and not a bankruptcy. But sub-sect. 7 does not apply to an entirely different class of provisions, such as those which relate to the power of the Court to make an adjudication of bankruptcy. A man cannot be adjudicated a bankrupt except on an act of bankruptcy which has occurred within six months before the filing of the petition. But that provision can have no application to a case where there is no adjudication at all, but where the whole jurisdiction is given to the creditors in consequence of the filing of the liquidation petition, given to them so long as a meeting can be duly called for the purpose of deciding whether a trustee shall be appointed or not.

It is said that *Ex parte Fenning* (1) applies. That was a decision of Lord Justice *James*, and he was a great bankruptcy lawyer. But all that that case really decided was this. There had been proceedings in *England* for a liquidation by arrangement, and there had been also bankruptcy proceedings in *Scotland*, and the Scotch proceedings had been made effectual by the appointment of a sequestrator. Afterwards the separate creditors of one of the debtors in *England* passed resolutions for a liquidation in *England* of the assets which had already become vested in the Scotch sequestrator, and appointed a trustee. The Registrar refused to register the resolutions, on the ground that there was necessarily no property which the trustee could administer, and therefore he said, "This is an inefficacious and useless resolution." The decision was affirmed by the Court of Appeal, and that is all which was really decided by Lord Justice *James*, although no doubt he used some words in his judgment which would seem to amount to an expression of opinion that a trustee could not be appointed more than six months after the filing of the liquidation petition. But when the case is clearly understood it only comes to this, that it was too late to appoint a trustee effectually. A trustee is appointed only to administer property, and there the creditors appointed the trustee so late that the property which would have to be administered by him had already gone to somebody else whose title could not be defeated by the trustee. That is all which that case decided,

(1) 3 Ch. D. 455.

and, notwithstanding that decision, I adhere to the opinion which I have expressed, that there is jurisdiction in the present case to order a fresh first meeting to be held.

Then comes the question whether under the circumstances a fresh first meeting ought to have been allowed? Unfortunately the Registrar did not very fully consider that question, but we have not been asked to hear further evidence on the point. If we had been satisfied that the majority of the creditors had acted fraudulently or in collusion with the debtor, so as to deprive the other creditors of an opportunity of being paid, or had in any other way not acted honestly in the resolutions which they passed, the case, to my mind, would have stood very differently. I intended, as I said before, that the opportunity of calling a fresh first meeting should be for the benefit of the creditors, so that they might be able to make up their minds whether, under the special circumstances of the case, it would be more to their advantage (and there would be great difficulties in a bankruptcy) that the existing liquidation proceedings should go on, or whether they should let bankruptcy take its course.

Although, in my opinion, there has been very great delay in the proceedings, yet I do not see anything from which we can come to the conclusion that what has been done was done fraudulently or improperly, so as to preclude the creditors from applying for another opportunity, not for the benefit of the debtor but with regard to their own interests, of expressing their opinion whether this liquidation by arrangement should proceed, or whether there should be a bankruptcy.

That disposes of the first appeal.

The second appeal is from the Registrar's order that the *Credit Company's* motion under the 12th sub-section of sect. 125 should stand over until after the time appointed for the holding of the fresh first meeting. In substance what he did was this,—he ordered that the motion should stand over, and that an opportunity should be given for the holding of a fresh first meeting, and for an expression of the opinion of the creditors at it. The order was unfortunately worded, but that, as the Master of the Rolls has said, will be corrected. In my opinion it was the most reasonable course which the Registrar could take. There cannot be any

C. A. 1883

Ex parte CREDIT COMPANY. *In re* MCHENRY.

Cotton, L.J.

great delay in calling this meeting. The creditors will then have an opportunity of expressing their opinion, and of considering the statement which must be laid before them by the debtor. If they still decline to make the liquidation effectual, I see no other course but to proceed in bankruptcy, and that would cut the matter very short. If, on the other hand, in the opinion of the creditors it is a case for a liquidation by arrangement, it will still be open to the present Appellants to satisfy the Registrar, if they can, that, under the circumstances, and having regard to the position of the majority, and the way in which they seek delay, or for any other reason, they cannot obtain justice under a liquidation by arrangement, that they cannot get paid as speedily and as effectually as if there was a bankruptcy, and it will still, I think, be open to them to apply for another adjournment. I think the Registrar exercised a very wise discretion in saying that the meeting must be called within a short time.

In my opinion both the appeals fail, and they must be dismissed with costs.

BOWEN, L.J.:—

I am of the same opinion. I think a fresh first meeting may now be held. I will only add one word as to the meaning of sub-sect. 7 of sect. 125 of the *Bankruptcy Act*. I think it means that the appointment of a trustee under a liquidation shall be deemed to be an equivalent for those steps in bankruptcy proceedings which are mentioned when the trustee is appointed. The object of the sub-section is to provide that a certain class of consequences which, according to the previous provisions of the Act, were to follow upon the presentation of a petition in bankruptcy, the service of such a petition, or an order of adjudication in bankruptcy, as the case might be, should also follow on the appointment of a trustee in a liquidation, and for the purpose of introducing those consequences, the appointment of a trustee is to be equivalent to one of those three events. It was not intended to incorporate, by reference, with regard to the proposed appointment of a trustee all the conditions or limitations which apply to the presentation of a petition in bankruptcy, or to the making of an order of adjudication in bankruptcy, and to enact, by implied

reference, that, unless those conditions were fulfilled and those limitations observed, a trustee should not be appointed. It seems to me that, even if the words of the sub-section were not in themselves clear enough to prevent this latter interpretation, you could prove to demonstration that such an interpretation of the section would lead to nonsense. It must be observed that the appointment of a trustee is to be equivalent, according to circumstances, to three things,—the presentation of a petition in bankruptcy, or the service of such petition, or an order of adjudication—three different things. Now, if by that reference all the conditions and limitations applicable to each of these three things are applied to one and the same thing, viz., the appointment of a trustee in a liquidation, you would be applying to that one thing three different sets of conditions or limitations, some of them wholly inconsistent with others, and perfectly incommensurate and irreconcilable with them. Although that is merely a verbal criticism, yet I pray it in aid of my construction of sub-sect. 7. But, dealing with the provisions, apart from the mere words of the sub-section, when it says that the appointment of a trustee is to be equivalent to something else, I think it means the appointment of the trustee when he is appointed.

COTTON, L.J.:—

In the order adjourning the hearing of the application for an adjudication, it will be proper to strike out the words "until after the creditors have come to some resolution," and to add liberty to the present Appellants to apply to the Court.

Solicitors for Appellants: *Munns & Longden.*
Solicitor for Debtor: *G. A. Sedgwick.*

W. L. C.

C. A.
1883
Aug. 2, 4.

Ex parte WARBURG.
In re WHALLEY.

Bankruptcy Appeal—Notice—Debtor not shewing Cause against Petition—Substituted Service—Jurisdiction—Bankruptcy Rules, 1870, *rr.* 36, 37.

When a debtor gives no notice under r. 36 of his intention to shew cause against a bankruptcy petition, and the petition is consequently heard in his absence, and the Court refuses to make an adjudication, if the petitioning creditor desires to appeal against the refusal he must serve notice of the appeal on the debtor.

In a proper case the Court of Appeal has jurisdiction to make an order for substituted service of a notice of appeal, though no express provision to that effect is contained in the Rules of Court.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

On the 22nd of March, 1883, Messrs. *Warburg & Dee* issued a debtor's summons against *G. W. Whalley*. It was found impossible to serve the summons on the debtor personally, and an application for an order for substituted service was made on the 9th of April, but was refused on the ground that there was not sufficient evidence that the debtor was keeping out of the way to avoid service. The application was renewed on further evidence on the 16th of April, and an order for substituted service was then made. The debtor failed to comply with the requirements of the summons within the time limited for that purpose, and *Warburg & Dee* presented a bankruptcy petition against him, alleging as an act of bankruptcy the non-compliance with the summons. The petition was served on the debtor personally when he was on board a ship which was just starting for *America*. He gave no notice under rule 36 of 1870 of his intention to shew cause against the petition, and the petition was heard in his absence.

The Registrar refused to make an adjudication, on the ground that the service of the debtor's summons was irregular, because the twenty-one days limited by rule 59 (1), for the service of a

(1) Rule 59. "A debtor's summons shall be personally served within twenty-one days from the date of the summons, by delivering to the debtor a sealed copy of the summons."

By rule 61, "A debtor's summons

S.C. post on subsequent application when debtor adjudicated bankrupt. W.N. 1883. 130. C.A.

debtor's summons had expired when the order for substituted service was made, and no extension of the time for service had been granted by the Court, and that consequently there was no evidence of an act of bankruptcy having been committed.

The creditors appealed. Notice of the appeal had not been in any way served upon or given to the debtor.

Cooper Willis, Q.C., for the Appellants:—

The debtor, not having given notice under rule 36 (1) of his intention to shew cause against the petition, was not entitled to be heard against the adjudication. There was no necessity, therefore, for serving him with notice of the appeal. And we could not serve him, for we do not know where he is. A debtor cannot be entitled, by keeping out of the way, to prevent an appeal from the refusal of an adjudication from ever being heard. The rules under the Judicature Acts contain no provision for making an order for substituted service of a notice of appeal.

THE COURT (*Brett*, M.R., and *Cotton* and *Bowen*, L.JJ.), said that some notice of the appeal ought to be served on the debtor, and that there was power to make an order for substituted service, and they directed that some evidence should be adduced to shew that it was impossible to serve the debtor personally.

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or a petition shall be served upon the debtor by an officer or a bailiff of the Court, or by the creditor or his attorney; but if personal service cannot be effected, the Court may grant extension of the time for service, or if the Court is satisfied by affidavit that the debtor is keeping out of the way to avoid such service, it may order service to be made by delivery of the summons or petition to some adult inmate at his usual or last known place of residence or business, or it may order, in the case of a summons, that a notice of the granting of the summons, according to the form in the schedule, be gazetted, and that the publication of such notice in the *Gazette* shall be deemed to be service on the debtor on the seventh day after such publication."

(1) Rule 36. "Where a debtor intends to shew cause against a petition he shall file a notice with the Registrar shewing the statements in the petition which he intends to deny or dispute, and transmit by post to the petitioning creditor a copy of the notice three days before the day on which the petition is to be heard."

Rule 37. "If the debtor does not appear at the hearing, the Court may make adjudication without further proof of the statements in the petition, if it shall think fit."

C. A. 1883 *Ex parte* WARBURG. *In re* WHALLEY.

Aug. 4. The following evidence was adduced.

The clerk who served the petition on the debtor on board the ship deposed that the debtor then stated that he was going out to *Texas*, but that he had left a power of attorney with Mr. *W. Maynard*, whom he would instruct to settle the matter. The deponent stated that he afterwards saw Mr. *Maynard*, who informed him that he had received no instructions from the debtor to settle the matter; that the debtor had gone to *Texas*, and that he believed it was his intention to remain there and not to return to *England*. The deponent added that he had made all possible inquiries with the view of ascertaining the whereabouts of the debtor, but had been unable to do so.

There was evidence that the newspaper having the largest circulation in *Texas* was the *Galveston News*, it being a daily and a weekly paper.

THE COURT (*Brett*, M.R., and *Cotton* and *Bowen*, L.JJ.), gave leave to effect substituted service of the notice of appeal by serving it on or before the 8th of August on Mr. *Maynard* and by advertisement in the *London Gazette* of the 10th of August, and also by advertisement within six weeks in the *Galveston News*, once in its daily and once in its weekly issue. If the advertisement in the *Galveston News* could be inserted in the month of August, it was to state that the appeal would be heard on the first day for the hearing of bankruptcy appeals in November, 1883. If, however, the advertisement could not be inserted until September, then it was to state that the appeal would be heard on the first day for hearing bankruptcy appeals in December, 1883.

Solicitors: *Coburn & Young.*

W. L. C.

C. A.
1883
Aug. 3.

In re NATIONAL COFFEE PALACE COMPANY. *Ex parte* PANMURE.

Measure of Damages—Warranty of Authority—Liability of Agent—Contract to take Shares—Winding-up—Summons by Liquidator.

L. instructed his brokers to apply for fifty shares at £1 each in a company which he named. They by mistake applied for and obtained an allotment to *L.* in another company. *L.* repudiated the shares, but his name was placed on the register. The company had at that time a very large number of shares unallotted, and in the opinion of the Court the shares were unsaleable in the market. The company was soon afterwards wound up, and the name of *L.* was removed on his application from the list of contributories. The official liquidator then claimed £50 from the brokers by way of damages for their misrepresentation of authority:—

Held, that the general rule as to measure of damages for breach of warranty of authority was applicable; that the liquidator was entitled to recover from the brokers the amount which the company had lost by losing the contract with *L.*; and that as *L.* was solvent and the shares unsaleable in the market, that loss was represented by the whole sum of £50 payable for the shares.

THIS was a motion by Messrs. *Panmure, Gordon, & Co.*, to discharge an order made by Mr. Justice *Chitty* in Chambers calling upon them to pay £50 to the liquidator of the *National Coffee Palace Company* (*Limited*), by way of damages, in respect of their application for an allotment of fifty shares to Mr. *G. H. Lawrence*.

On the 19th of May, 1879, Mr. *G. H. Lawrence* instructed Messrs. *Panmure, Gordon, & Co.*, who were stockbrokers in *London*, to apply on his behalf for fifty shares in the *National Coffee Public Houses Company* (*Limited*).

By a mistake of their clerk, Messrs. *Panmure* sent in an application in the name of Mr. *Lawrence* for fifty shares of £1 each in the *National Coffee Palace Company*. The application was made on one of the usual printed forms. The whole of the £50 was to be paid on allotment.

On the 21st of May the *National Coffee Palace Company* allotted fifty shares to Mr. *Lawrence*, and a letter of allotment was sent to him on the same day.

On receipt of the letter Mr. *Lawrence* informed Messrs. *Panmure*

C. A. 1883 — *In re* NATIONAL COFFEE PALACE COMPANY. *Ex parte* PANMURE.

of the mistake, and refused to take the shares. Messrs. *Panmure* accordingly on the 26th of May wrote to the secretary of the *National Coffee Palace Company* stating that they had applied for the shares under a mistake, and that Mr. *Lawrence* had nothing to do with the mistake, and asking the secretary to cancel the allotment.

The secretary replied on the same day saying that the contract was complete and that it would be illegal to cancel the shares.

Mr. *Lawrence's* name was forthwith placed on the register in respect of the fifty shares, and he took no steps to have it removed.

On the 27th of August, 1879, an order was made to wind up the company.

The company had a nominal capital of 250,000 shares. At the date of the allotment to Mr. *Lawrence* only 7250 had been allotted; and after the allotment only 4255 more were allotted, so that at the commencement of the winding-up the number of shares allotted amounted to 11,505. There was no evidence that at the date of the transaction the shares were ever sold in the market.

Mr. *Lawrence's* name was at first included in the list of contributories, but it was taken off by the Chief Clerk in November, 1879, affidavits having been filed by Mr. *Lawrence* and Messrs. *Panmure* that the allotment had been made by mistake.

The liquidator at first proposed to bring an action against Messrs. *Panmure* for damages on their misrepresentation of authority, but it was subsequently arranged that the matter should be disposed of by Mr. Justice *Chitty*, who made an order in Chambers on the 10th of April, 1882, that Messrs. *Panmure* should pay £50 to the liquidator by way of damages in respect of their application for the allotment to Mr. *Lawrence*.

Messrs. *Panmure* then took out this summons to discharge the order of the 10th of April, but the application was refused by Mr. Justice *Chitty* on the 24th of May, 1883.

From this decision Messrs. *Panmure* appealed.

Holl, Q.C., and *J. D. Walker*, for the Appellants:—

The only question in this case is as to the measure of damages

to which the liquidator claiming on behalf of the company is entitled. It is not a case of misrepresentation of authority. Messrs. *Panmure* had authority from *Lawrence* to apply for shares, but they by mistake applied to the wrong company. Therefore *Collen* v. *Wright* (1) and the other cases relating to the measure of damages where there has been misrepresentation of authority are not applicable: *Malins* v. *Freeman* (2). We admit that we are liable for actual damage to the company, but there was no actual damage in this case. There were no expenses, and the company might have allotted the shares to some one else. The damages ought therefore only to be nominal damages.

But assuming that we are liable for breach of the implied contract of warranty of authority, the question is what is the measure of damages on that footing. All that the company are entitled to is the difference between £50 which they would have obtained from *Lawrence* and the value of the shares allotted to him at the date of the allotment. The company cannot be heard to say that the shares were valueless. This is the extent of the damages they could have recovered against *Lawrence* in an action if the contract had been binding on him and he had repudiated the shares; but they claim to recover the value of the shares and at the same time to keep the property which they sold. The fact that there was no sale for the shares in the market is not conclusive as to their value. There is no evidence that at that time the company was insolvent; it may have had sufficient assets to return to the shareholders all the money which they had paid. That the shares were not really valueless is proved by the fact that 4255 were allotted after the date of this transaction.

Whitehorne, Q.C., and *Warrington*, for the official liquidator:—

This claim is in the nature of an action against Messrs. *Panmure* for a breach of their implied warranty of authority. The measure of damage in such a case is the loss which the Plaintiff has sustained by the loss of the bargain: *Collen* v. *Wright*;

(1) 7 E. & B. 301; 8 E. & B. 647. (2) 2 Keen, 25.

C. A. 1883 — *In re* National Coffee Palace Company. *Ex parte* Panmure.

Spedding v. *Nevell* (1); *Godwin* v. *Francis* (2); *Simons* v. *Patchett* (3); *Hughes* v. *Graeme* (4); *Richardson* v. *Williamson* (5); *Smith's* Mercantile Law (6). The question, therefore, here is, what did the company lose by losing the contract with *Lawrence?* They lost him as a solvent shareholder, in other words they lost the £50 which he would have paid them on allotment. It is true that the company had the power of taking back the certificates and re-allotting the shares, but there was very little demand for the shares, and they had plenty of other shares unallotted for those who applied for them. Therefore there was an actual loss to the company of £50 by losing this contract.

Holl, in reply.

Brett, M.R.:—

This case has presented more than the usual difficulties which are met with in dealing with the question of the proper measure of damages, and I know no branch of law which is more difficult. The case has been extremely well argued, but it is our duty to follow the authority of decided cases; it is not open to us to go into theoretical considerations of what we should think would be the most correct measure if the question were open. What we have to do is to consider what is the measure of damages which has been adopted by the Courts for many years past, and to adopt that measure. The reason for doing so, is that when Courts of Law have construed a contract in a particular way, and the interpretation which has been put upon it by the Court of Law comes to be accepted in the trade or business and people afterwards make contracts on that understanding, a Court of Appeal ought to hold itself bound by that decision; because if it altered the principle of interpretation the Court would be construing the contracts contrary to the meaning of those who made them. In the present case a firm of brokers have, through an accidental misunderstanding, applied for shares in a company to be allotted to a person

(1) Law Rep. 4 C. P. 212.
(2) Ibid. 5 C. P. 295.
(3) 7 E. & B. 568.
(4) 33 L. J. (Q.B.) 335.
(5) Law Rep. 6 Q. B. 276.
(6) 6th Ed. p. 171.

who had not authorized them to apply for them in that company. They are called upon to pay damages. This must be treated as if it were an action for damages, although it is really an application by the official liquidator in the course of the winding-up of the company. It is an application for damages not on the ground that the Defendants had broken the contract to take shares, but that they had made an unintentional misrepresentation concerning the authority to take them. It has been held that when a person in error assumes that he has authority to make a contract for a principal when he is not really his principal, by assuming that he had authority to bind the principal, he warrants that he had that authority which he represented himself to have. The contract in respect of which damages are claimed is not the contract which the principal would have made, but only a contract to the extent of the warranty. That is shewn clearly by *Collen* v. *Wright* (1). He contracts that he had authority to bind the principal whereas he had no such authority. I say nothing as to the time when the contract was broken, for on that there may be difference of opinion, but as he had no such authority the warranty has in fact been broken. In the present case Messrs. *Panmure* contracted that they had authority which they had not, so they have broken their contract. The only question is what are the damages for the breach of such a contract?

In ascertaining the damages two questions always arise: first, what is the measure of damages? and secondly, to what amount does the measure lead in the particular case? The measure of damages in actions for breach of warranty is always the same in every case. I will not consider what theoretically it ought to be, but I say that we must decide it according to the rule that has been followed for a series of years. *Spedding* v. *Nevell* (2) and *Godwin* v. *Francis* (3) are cases in which the plaintiff was the intended purchaser, and *Simons* v. *Patchett* (4) was a case in which the plaintiff was the intended vendor, and in all these cases the Court laid down that the measure of damages was what the plaintiff actually lost by losing the particular contract which was to have been made by the alleged principal if the

(1) 7 E. & B. 301; 8 E. & B. 647.
(2) Law Rep. 4 C. P. 212.
(3) Law Rep. 5 C. P. 295.
(4) 7 E. & B. 568.

C. A 1883

In re NATIONAL COFFEE PALACE COMPANY. *Ex parte* PANMURE.

Brett, M.R.

defendant had had the authority he professed to have; in other words, what the plaintiff would have gained by the contract which the defendant warranted should be made. If that be the measure of damages, it does not depend upon the amount which would have been awarded to him in an action against the alleged principal if the contract had been broken by him; that may not be the same amount as what the plaintiff has actually lost. We may test it in this way. If the action were brought against the principal because he had broken the contract, the amount actually recovered would be quite different if he were solvent and if he were insolvent; if he were solvent the plaintiff would recover the whole loss, if he were insolvent he might not recover a shilling. Therefore it is what the plaintiff actually lost, not what the verdict of a jury would have given him, for the execution might have produced nothing. Again, the defendant might be in such a position that you would not have to consider the question of breach of contract at all. In the present case Messrs. *Panmure* are probably people who would never break their contracts, and therefore you must come back to consider what the Plaintiff has actually lost by losing this particular contract. What then did the company lose? The question is not what did the liquidator lose, or what did the creditors lose; the creditors have no claim except on the assets of the company when they are realized; but what would the company have lost if it were still an existing company. In this particular case what would they have got by the contract with Mr. *Lawrence* if he had given authority to make it? If he had been insolvent they would not have got a farthing; but he was not insolvent, and therefore in this particular case they would have got £50 from him on the allotment of his shares, and they would not have given him anything; it would not have been like an ordinary vendor handing over goods. They would have only handed over a piece of paper. In return for his £50 in money they would only have given him a phantasy. The company had a nominal capital of 250,000 shares, of which they had only allotted a very small number, therefore the phantasy which they gave him cost them nothing. The sum of £50 was *primâ facie* the measure of damages, and there is nothing to displace it. In my opinion, £50 was the actual loss which they suffered by

losing the contract which would have been made with them if *Panmure & Co.* had really had the authority they professed to have; therefore, according to the rule that has been laid down in the decided cases, that is the measure of damages which must be applied to this case. The order of Mr. Justice *Chitty* was therefore right, and the appeal must be dismissed with costs.

C. A. 1883 *In re* NATIONAL COFFEE PALACE COMPANY. *Ex parte* PANMURE.

COTTON, L.J.:—

This application must be treated as an action for damages, in which the Plaintiff proved that the Defendant represented to the company that he had authority to apply for an allotment of shares to *Lawrence*, and warranted that statement to be correct. I participate in the doubt which has been expressed whether, if the question had been open, we should have laid down the measure of damages as it has been laid down in the decided cases. But I agree, that when for a number of years a particular rule has been laid down on such a subject it ought not to be departed from; and a rule was laid down as to the measure of damages in cases like the present, in *Simons* v. *Patchett* (1), where it was held, that the measure of damages is what is lost to the plaintiff by the loss of the contract. What is that loss here? The liquidator cannot claim for what he has lost, nor is it a question what the creditors have lost; they are only entitled to what is ascertained to be assets of the company. But the question is what did the company lose? If the representation as to authority had been true, *Lawrence* would have been fixed as the owner of the fifty shares, and the company would have been entitled to receive £50 on allotment. If so, on the footing that *Lawrence* would have become the owner of fifty shares, the loss must be taken to be *primâ facie* the value of the fifty shares. Then what has the company to account for on the other side? What probability was there that some other person would have taken the shares? According to the evidence, out of their nominal capital of 250,000 shares, only 7250 had been allotted before this transaction; and only 4255 were allotted afterwards. That being so, it appears very unlikely that they would have found any other person to take up those fifty shares. Therefore the company has lost a solvent shareholder

(1) 7 E. & B. 568.

C. A. 1883

In re NATIONAL COFFEE PALACE COMPANY. *Ex parte* PANMURE.

of fifty shares, with no opportunity of finding another, and that loss must be the measure of damages in this case. I therefore agree that the appeal ought to be dismissed with costs.

BOWEN, L.J.:—

In this case a broker applied for shares in the company on behalf of *Lawrence*. At the time when he made the application he had no authority to make it. That being so, the company, through the liquidation, claim damages against the broker. The first question is, what is the exact character of the claim? It is in the nature of a claim for damages for breach of implied warranty by the broker that he had authority to make the application. The character of this kind of claim is laid down in *Collen* v. *Wright* (1), where it is said that "a person professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract upon the faith of the professed agent being duly authorized that the authority which he professes to have, does, in point of fact, exist." Mr. *Holl*, in his argument, suggested that this case was distinguishable, because the misrepresentation was simply a mistake on the part of the broker, and there was no intention to apply for shares in this company at all. The answer to that is, that the agent did what he intended to do; whether what he intended to do was different from what he would have done if he had acted with more thought, is a different question. But that cannot affect the claim of the company against the broker, so far as he is bound by his representation to the company. It is important to consider what is the real character of the claim in order to see what is the proper measure of damages. It is said, sometimes, that the agent promises that the fact which he asserts, exists. That is not strictly correct. He affirms that the fact exists and promises that if the fact does not exist, the other party shall be put in as good a position as if it did exist. Another way of looking at it is that there is a promise made by the agent to indemnify the other party against any damage which he may incur by his acting on the representation. The latter view is a reasonable one, but it is not that which was acted upon in

(1) 8 E. & B. 657.

Spedding v. *Nevell* (1) and *Godwin* v. *Francis* (2). It was held in those cases that the person who contracts with the agent is entitled to be put in the same position as if the representations made were true. Mr. *Holl* argued that we ought to look at it as if the contract were binding upon the principal, and to consider what would have been recoverable from him in an action for breach of it. The expression "recoverable" is ambiguous; it cannot mean recoverable in the sense of the amount of damages which a jury would have been directed to assess for the breach of the contract. If so, the plaintiff would be getting as much damages against the agent for an insolvent, as against the agent for a millionaire; but that clearly does not represent the actual loss to the plaintiff in each case. The fact is, that an agent does not promise that his principal shall carry out the contract, but only that he shall be bound by it. What the company has lost is a binding contract—whether also it was a valuable contract, must depend upon the character of the contracting party. The company lost the contract with a particular person. What then is the measure of the damages? It must depend on the question of fact, what did the company lose? Mr. *Whitehorne* says they lost an allottee. Mr. *Holl* answers, that they might have got another for the same shares, and if so they suffered no damage. But could they have got another allottee? The onus is on him to shew that they could. I think that they could not. There were only about 4255 shares allotted after the allotment to *Lawrence*, and as they had so many shares remaining unallotted, it shews that there were no other persons ready to take them. If the shares had been returned to the company, they would not have been able to place them again, as the circle of their customers was so limited.

Mr. *Holl* argued in this way: "Assume that I was a *bonâ fide* allottee, I am entitled to set against the loss of the money the value of the shares." But here there is *primâ facie* evidence that the shares were worthless. An allottee may have wanted the shares either to sell or to hold. But there is no proof that any of those shares were ever sold in the market, and the probability is that they were not, in fact, saleable. Were they of value to

(1) Law Rep. 4 C. P. 212. (2) Law Rep. 5 C. P. 295.

C. A. 1883 *In re* National Coffee Palace Company. *Ex parte* Panmure.

hold? This cannot be said of shares in a company which was insolvent. Therefore, whether for the purpose of selling or holding, they were valueless. Consequently, there is nothing to set against the loss of £50 sustained by the company, and that sum must be the amount of damages to which they are entitled.

Solicitors: *Lyne & Holman; Oehme & Summerhays.*

M. W.

C. A. 1883 PEARSON, J. *Feb.* 23, 24. C. A. *June* 13.

PRESTNEY *v.* CORPORATION OF COLCHESTER.

[1880 P. 2078.]

Practice—Production of Documents—Place of Production—Alteration of Order.

Where an order has been made for production of documents at a particular place the Judge, or his successor, may at any time make a fresh order appointing a different place if the circumstances render it advisable. And although such an order may be appealed from, the Court will not interfere with the Judge's discretion except on some special ground.

The common order having been made for production of documents by the Defendants at their solicitor's office in *London*, the Judge, six months afterwards, made another order that the documents should be produced at *Colchester*. The documents consisted principally of ancient charters and books of account belonging to the corporation:—

Held, by the Court of Appeal, that the order was right; but a direction was added that the Plaintiffs should be at liberty to apply for the production of any documents which might be more conveniently examined in *London*: and that the Defendants should undertake to pay any additional costs caused by the alteration in the place of production.

THE action in this case was brought by three freemen of the borough of *Colchester* on behalf of themselves and all other freemen of the borough, in order to obtain a declaration that the corporation was possessed of three specific properties held by them upon trust only for the freemen of the borough, and for consequential relief.

On the 19th of May, 1882, the common order was made by Vice-Chancellor *Hall* on the application of the Plaintiffs that the Defendants should produce the documents in their possession at the office of Messrs. *Philbrick & Free*, their solicitors, at *Austin Friars*, in the City of *London*.

The documents in question were between 3000 and 4000 in number, and consisted in part of ancient charters commencing with the reign of *Richard* I., and partly of accounts and account books of the corporation commencing with the reign of Queen *Elizabeth*. Some of the old documents had been damaged by a fire at the Castle at *Colchester*, and could not be moved without danger of injuring them.

Under these circumstances the Defendants objected to bring them to *London*, and now took out a summons to vary the order for production by directing them to be produced at *Colchester*.

The summons was adjourned into Court, and came on for hearing before Mr. Justice *Pearson* on the 23rd of February, 1883.

Smart, and *Eustace Smith*, for the Defendants:—

The ordinary practice, no doubt, is that inspection of documents should take place at the office of the solicitors upon the record of the producing party: *Brown* v. *Sewell* (1); but the agents in *London* of the solicitor in the country are not the solicitors on the record, though it may be proper to serve them with notices as agents. The inspection of these documents ought to take place at the country solicitor's office according to the practice referred to in that case. That the solicitor in the country is the solicitor on the record, the *London* solicitor being merely an agent, is shewn by the various forms in use in reference to parties changing their solicitors, and which are set forth in *Daniell's* Chancery Forms (2). But however that may be, the Court has, in the exercise of its discretion, full power to say what shall be done having regard to all the circumstances of the case. By Order XXXI., rule 11, an order may be made for production of documents as the Court shall think right. Full discretion is given to the Court to deal with the documents when produced as shall appear just.

[PEARSON, J.:—Sect. 66 of the *Judicature Act*, 1873, gives power to the Court to order production at the office of any district registrar.]

In this case there are some tons in weight of documents, many

(1) 16 Ch. D. 517. (2) Nos. 2113, 2114, 2116, 2118, and 2121.

C. A. 1883 PRESTNEY v. CORPORATION OF COLCHESTER.

of them are very ancient, and it will be very inconvenient to produce them elsewhere than at the muniment room at *Colchester*. Where documents are in daily use for ordinary business purposes it is well established that production may be made at the place of business: *Draper* v. *Manchester, Sheffield, and Lincolnshire Railway Company* (1); *Bonnardet* v. *Taylor* (2). In the opinion of Lord Justice *Turner* in the former case the words "his solicitors and agents," in the order directing inspection do not give a right of inspection to an agent appointed *pro hâc vice*. If a skilled person should be engaged to inspect the documents, the greater part of the costs and expenses will be the same whether documents be produced to him in *London* or at *Colchester*, and the extra costs and expenses can be set off against the fees that would be payable if it should be considered that the inspection ought to take place at the office of Record and Writs Clerks, which is all that the Plaintiffs can be strictly entitled to. But it is submitted that *Colchester* is the proper place for inspection, that it would be better for all parties, as there it can take place in the muniment room at the castle where every convenience will be found. There should not be any terms imposed on the Defendants as to the costs, but they should be made costs in the action.

W. Pearson, Q.C., and *H. J. Hood*, for the Plaintiffs:—

It is the established practice of the Court to have the documents produced at the office of the solicitor in *London* or in the office of the Clerk of Records and Writs. By Order IV., rule 1, there must be an indorsement upon every writ of the address of the plaintiff's solicitor, and it must be not more than three miles from *Temple Bar*. The order for production always mentions the office of the *London* agent. The order in *Bonnardet* v. *Taylor* must in the first instance have been by consent. According to the Consolidated Order XLII. of 1860 the practice is clear that the production should be in *London*; and the decision in *Prentice* v. *Phillips* (3) confirms that view. There is nothing in this case which entitles the Defendants to have the order varied. If the inspection is ordered at *Colchester* the Defendants ought to pay all the extra costs occasioned thereby.

(1) 3 D. F. & J. 23. (2) 1 J. & H. 383. (3) 2 Hare, 152.

PEARSON, J. :—

The question which has arisen does not very often come before the Court; and so far as I am able to come to a conclusion upon the argument, there is no rule which absolutely applies to the case. The ordinary rule under the old practice was, I have no doubt, that all deeds and documents should be produced at the Record and Writ Clerk's office. That practice was undoubtedly modified at a later time by production being ordered to be at the solicitor's office. Now when I ask myself who the solicitors upon the record are in a case in which the parties have agents in *London* and a solicitor for whom they act at *Colchester*, I come to the conclusion that the solicitor's office at which the documents should be produced for inspection should be the office in *London* of the solicitors who represent the solicitor in the country; seeing that the rule of the Court is that where there is a country solicitor he is bound to have on the record an address which shall be not more than three miles from *Temple Bar*, and there all notices and summonses are to be served. Now it would be reducing the matter to an absurdity to say that, whereas all notices must be served at the particular office specified in *London* the documents of which inspection might be required must be considered as altogether excepted from the rule, and that they can only be inspected at the solicitor's office in the country. I do not consider that the power of the Court has been so restricted that in a particular case it may not depart from the rule, and allow inspection at a place which appears from the evidence to be more convenient. In very early times the Court did in fact depart from the rule, as for instance, in regard to books and documents in daily use, say at *Berwick-upon-Tweed*, by declaring that it would not be proper to put the parties to the inconvenience of producing such books and documents in *London*. Under the circumstances I have to consider on the application of the Plaintiffs to have inspection in *London*, what order I ought to make as to the production of these books, papers, and documents, there being an order for the Defendants to produce them for inspection in *London* at the office of the *London* agents of the solicitor in the country, whom I consider the solicitors for the present purpose. It was urged for the Plaintiffs that it is exceedingly important to them that inspection

C. A. 1883 PRESTNEY v. CORPORATION OF COLCHESTER. Pearson, J.

should take place in *London*, and Mr. *Pearson* told me that it would be an absolute denial of justice to them if I were to make an order that the production for inspection should be at any other place than in *London*. He referred to the poverty of the Plaintiffs, and said that they would be put out of Court altogether, and that they would be unable to go on with the action if the production for inspection were to take place in the country; but I do not think I ought to consider any argument in reference to the poverty of the Plaintiffs. I must not have regard to the question whether the Plaintiffs be rich or poor, but make exactly the same order in the one case as in the other. I ought not to say, "Because you are rich inspection shall take place in the country"; nor "Because you are poor the inspection shall take place in *London*"; but I must decide the case having regard only to all the circumstances of the case, and according to what seems to me to be the proper course. These are not ordinary deeds and documents, but they are old charters and account books and vouchers for all moneys which have been paid and mentioned in the accounts, and there are a very large number of bundles of papers which must be in loose sheets and very capable of being easily destroyed or lost in transit. The number of records also is very great, being those of all the deeds and transactions of the corporation of *Colchester*, the Defendants in the action. The loss of such deeds and documents might be very material, not only as regards the corporation but also as regards the rights of other parties who may hereafter be engaged in litigation with the corporation—rights, I may say, which have been, either in regard to the river or the borough, the subject of litigation frequently in this Court, and for aught I know may be again hereafter. Therefore, having regard to the importance that these documents and papers should be carefully preserved, and taking all the circumstances into consideration, and considering myself not absolutely fettered by any rule, but bound to do what I think will be complete justice, I shall hold that it will be under the circumstances right to order production for inspection at *Colchester* and give leave to the Plaintiffs at the trial of the action, whether successful or not, to apply to the Court for the payment to them of any extra costs which shall be occasioned to

them by reason of the inspection being ordered to take place at *Colchester* instead of in *London*. I thought at one time that I might be able to make a declaration with regard to the extra costs, seeing that the Defendants come here for what I may call an indulgence. But I do not see my way to say at the present moment what expenses the Plaintiffs should be allowed. I cannot now come to any conclusion as to what would be the right sum. The expenses may be much larger than any sum I should be disposed to name, and if I were to fix a sum there might be a more elaborate inspection of documents than there otherwise would be. But when the case comes on for trial after inspection has been had the Court will have the materials before it to decide, whether the Plaintiffs are successful or unsuccessful, what sum they ought to receive for extra costs. I can only say that if this case goes higher, as I hope it may, the Court of Appeal will be able to make some positive rule which will guide Courts of first instance in making orders on the subject hereafter.

I now direct that the production for inspection shall be made at the muniment office at the castle of *Colchester*, and the costs of this summons will be costs in the action.

The order made by Mr. Justice *Pearson* was to the effect that the order of the 19th of May, 1882, so far as it related to the production and inspection of the documents therein mentioned, be varied, and as varied be as follows: That the Defendants should produce the documents at all reasonable times at *Colchester Castle* instead of the offices of Messrs. *Philbrick & Free*; but that the Plaintiffs, whether successful in the action or not, were to be at liberty to apply to the Court at the trial for payment to them of any extra costs occasioned to them by such production at *Colchester*.

T. F. M.

C. A.

From this order the Plaintiffs appealed. The appeal was heard on the 15th of June, 1883.

W. Pearson, Q.C., and *H. J. Hood*, for the Appellants:—

Mr. Justice *Pearson* had no jurisdiction to make the order. The previous order made by Vice-Chancellor *Hall* was final. It

C. A. 1883

PRESTNEY v. CORPORATION OF COLCHESTER.

was not subject to appeal; being a matter in the absolute discretion of the Judge: *Bustros* v. *Bustros* (1).

[*Kekewich*, Q.C., *amicus Curiæ*:—I was in that case. The Court declined, under the circumstances, to interfere with the Judge's discretion; but the question whether there was any appeal from his discretion was not decided.]

The order of Vice-Chancellor *Hall* was made in Chambers, and the proper course would have been to move in Court to discharge it under sect. 50 of the *Judicature Act*, 1873: *Holloway* v. *Cheston* (2). Such a motion must have been made within twenty-one days: *Dickson* v. *Harrison* (3); *Heatley* v. *Newton* (4). It is now too late to disturb the order. Therefore Mr. Justice *Pearson* had no power to make an order varying it.

With respect to the merits, the expense of examining the documents at *Colchester* will be very great. Some of the most important of the documents are accounts and books of account, they will need very careful examination, and we cannot examine them so well at *Colchester* as in *London*. There is no reason why the usual practice which has been established for a great many years should be departed from.

Philbrick, Q.C., *Smart*, and *Eustace Smith*, for the Defendants, were not called on.

BAGGALLAY, L.J.:—

I am of opinion that this appeal fails substantially, though I think we may make an order which will afford an additional protection to the present Appellants. As regards the power or jurisdiction of Mr. Justice *Pearson* to make the order which he has made if the circumstances of the case warranted it, I entertain no doubt. I take it that after a Judge has made the usual order for the production of documents at any particular place, he or his successor on the Bench may at a subsequent period, if the circumstances appear to warrant it, direct that those documents previously directed to be produced at one place, or some

(1) 30 W. R. 374.
(2) 19 Ch. D. 516.
(3) 9 Ch. D. 243.
(4) 19 Ch. D. 326.

of them, may be produced at another. I merely refer to the case of *Bonnardet* v. *Taylor* (1), where the documents were commercial documents, because Vice-Chancellor *Wood* seemed to entertain no doubt whatever that he had full power, after an order had once been made for the production at *Liverpool*, to make an order for the production at *Newcastle*. That was a considered matter, because it was originally a summons in Chambers, and was adjourned into Court for decision.

If there was jurisdiction for Mr. Justice *Pearson* to make this order has he, under the circumstances of the case, made an order which cannot be justified or ought to be discharged? In my opinion it is one of that class of cases in which, though there may be said to be a right of appeal against the decision, yet, excepting in a very strong case, the Court will not interfere with a discretion exercised by a learned Judge, although the individual members of the Court may think that perhaps had they been in the position of the Judge of first instance they might have come to a different conclusion. Unless they are of opinion that his decision was manifestly wrong, I think this is one of the class of cases in which the Court will not interfere. But so far from thinking that the view taken by Mr. Justice *Pearson*, in the circumstances of the case, was wrong, I am bound to say that now that we have the whole case fairly placed before us, I think that, so far as the general terms of the order are concerned, it was right. At the same time I think that there may be some documents which the Appellants may desire to examine more in detail, and that facilities for that further or more complete examination may be given by having the production in *London*, and while we refuse the appeal we should give leave to the present Appellants to make any application they may be advised as regards the production of any particular documents. I hope that the availing themselves of that leave will be rendered unnecessary by the corporation of *Colchester* at once agreeing to produce those in *London* which it will be reasonable so to produce. If they unreasonably refuse, and the Appellants are compelled to come to the Court to ask for a compulsory order, the Court will know how to deal with the costs of an application of that kind. I do

(1) 1 J. & H. 383.

C. A. 1883 PRESTNEY v. CORPORATION OF COLCHESTER. Baggallay, L.J.

not anticipate that such will be the case. I gather that the corporation will be willing to produce in *London* all such documents as may be deemed necessary on the part of the Plaintiffs in support of their case, unless some sufficient reason exists as regards the condition or the number or bulk of those documents, which would make it unreasonable that they should do so. I think, however, that as this is an indulgence, and as the order of Mr. Justice *Pearson* was an indulgence, and was so treated by him when he gave the Appellants liberty to apply for any additional costs occasioned by the examination in *Colchester* instead of in *London*, whether they were successful or unsuccessful in the action, that qualification should be a little more full, and that the order should be that the corporation undertake to pay such additional costs occasioned by the production in *Colchester* instead of the production in *London* as the Judge of the Court may deem reasonable on the hearing of the action. We think the costs of the appeal should be costs in the action.

COTTON, L.J.:—

There are two questions here, and the first is whether Mr. Justice *Pearson* had any power to make this order. Now I think that probably the order was wrong in form. There was no power in him to hear by way of appeal an order which had been made by his predecessor, nor even by himself, after the lapse of time which had occurred; and the proper form of order, I think, would have been this, that notwithstanding the directions contained in the previous order the Defendants should produce the documents which by that order they were directed to produce in *London* at *Colchester* at the place named. The order being in that form I have no doubt that Mr. Justice *Pearson* had full jurisdiction and power to make such an order because the former order did not decide anything as of right between the parties, but merely directed how the documents which are mentioned in the affidavit should be produced; and the matter not being then brought before the Court as to the inconvenience of producing these documents in *London* rather than in *Colchester*, it was put in what is the common form. In my opinion the Judge must have a right in dealing with such a question, and in dealing with what has

been directed by a previous interlocutory order, when new facts are brought before him to shew that following the precise directions of that interlocutory order will cause what he considers unnecessary inconvenience, or other injury to the parties, to give directions that notwithstanding the previous interlocutory order a different mode shall be adopted of carrying into effect the substance of the previous order. It would be very different if this were an interlocutory order in which the rights of the parties had been decided, then it is a case for appeal, and appeal only, and it must be prosecuted in the ordinary way. Here where it is merely directing the mode in which the Plaintiffs are to avail themselves of the right of inspection, in my opinion the Judge has a perfect right, and it is his duty, on new facts being brought before him which may render it necessary to do so for the purpose of the due administration of justice to make a new order, varying the form and giving a new direction as to the mode in which production shall be made. I have known it done frequently in my practice at the Bar.

Now is this order right? I think the order was right. I say nothing as to this order not being appealable. The Court of Appeal is always reluctant to interfere with the exercise by a Judge in the Court below of a discretion, unless it can see really that it has been exercised on a wrong principle, where, as has sometimes been said, it is not an exercise of the discretion which the Judge has, but an attempt to exercise some other discretion.

In this case I think the Judge was perfectly right. There are numbers of documents which are muniments of title of the corporation, they are kept in the only place where the muniments can properly be kept at *Colchester*, and as to many of them it would be dangerous to the documents to bring them up to *London*. That being so, I think the proper place to produce them in mass is the place of deposit at *Colchester*, the muniment room. Still I think the Plaintiffs will have a perfect right to come to the Court to say that there are some of these documents the inspection of which at *Colchester* would cause very great additional expense and inconvenience to the Plaintiffs and the Plaintiffs' advisers, and that there can be no risk in bringing those up to *London*. If that is made out, then I think, on the principle

C. A. 1883 PRESTNEY v. CORPORATION OF COLCHESTER. Cotton, L.J.

which I before stated, the Judge would be right, notwithstanding this order, in giving a direction that certain specified documents as to which that principle would apply should be brought up to *London*, and not kept down at *Colchester*. I think, therefore, the proper addition will be that suggested by Lord Justice *Baggallay*, that there should be an addition that this is not to prejudice the Plaintiffs in any application they may make with reference to any particular documents of which they may desire to have inspection in *London*. So far as I can express an opinion, I think that should be only where there are documents as to which there is no reasonable objection to their being brought up to *London*, and as to which it might be inconvenient to go to *Colchester* to inspect them.

As regards the other matter, I think the Defendants, asking for indulgence, were not put quite enough under terms in the Court below, and I think it will be proper to add these directions. "The Defendants undertaking to pay any additional costs which the Judge at the hearing may hold to have been reasonably incurred by reason of the production in *Colchester* instead of in *London*."

Solicitor for Plaintiffs: *C. Harris.*

Solicitors for Defendants: *Philbrick & Free*, agents for *F. B. Philbrick, Colchester.*

M. W.

In re BELLAMY AND METROPOLITAN BOARD OF WORKS.

C. A. 1882 KAY, J. *Nov.* 25, 27, 29. C. A. 1883 *June* 8, 9, 26.

Vendor and Purchaser—Sale by Trustees—Authority to Solicitor to receive Purchase-money—Breach of Trust—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 56.

The 56th section of the *Conveyancing Act*, 1881, does not authorize vendors who are trustees with a power of sale to require the purchaser to pay the purchase-money to their solicitor on production of the deed of conveyance duly executed in cases where before the Act they could not have required the purchaser to pay the purchase-money to their solicitor under a special authority.

Trustees of real estate with a power to sell and give receipts, sold the estate. The purchasers required that the vendors should attend in person to receive the purchase-money, or should authorize the purchasers to pay it into a bank to the joint account of the vendors. The vendors insisted that the money should be paid to their solicitor on his producing the conveyance duly executed. They gave no special reason why the money should be paid to the solicitor, but relied on the 56th section of the *Conveyancing Act*, 1881. A summons having been taken out under the *Vendor and Purchaser Act*:—

Held (*dissentiente Baggallay*, L.J.), that the 56th section had no application, and that the purchasers had a right to insist on their requisition.

The decision of *Kay*, J., reversed.

THIS was a summons taken out under the *Vendor and Purchaser Act*, 1874, by the Metropolitan Board of Works, who entered into a contract on the 6th of May, 1881, with the Rev. *James Bellamy* and *Eleanor Coates Tylden* for the purchase of property for the purpose of making certain street improvements. The vendors were trustees under the will of the Rev. *William Tylden*. They had power to sell and to give receipts for the purchase-money, with the usual declaration that the persons taking such receipts should not be obliged to see to the application of the purchase-money, or be liable for the mis-application or non-application thereof.

The solicitors for the purchasers required that on the completion of the purchase the vendors should either attend personally to receive the purchase-money, or should give the Board a written direction signed by the vendors to pay the purchase-money into a bank to the joint account of the vendors.

C. A. 1883 — *In re* BELLAMY AND METROPOLITAN BOARD OF WORKS.

On the other hand the solicitor for the vendors insisted that it would be sufficient if he attended and produced the deed of conveyance duly executed by the vendors, and containing a receipt duly signed by them, and that thereupon the purchase-money ought to be paid to him. He gave no special reason why the money should be paid to him rather than to the trustees in person, but relied on the 56th section of the *Conveyancing Act*, 1881. The Board accordingly took out a summons for a declaration that the vendors should attend personally to receive the money, or give a written direction that it should be paid into a bank to the joint account of the vendors.

W. Pearson, Q.C., and *Pownall*, for the Metropolitan Board:—

This is a representative case and of great importance to the Board, as similar cases are constantly occurring. The Board would act improperly if they paid these moneys to the solicitors of the vendors, as the decisions shew that trustees authorizing their solicitors or any other third persons to receive purchase-moneys commit a breach of trust, and if the moneys are misapplied the purchasers are not exonerated—they may be made responsible to the persons interested.

George Henderson, for the Vendors:—

The 56th section of the *Conveyancing and Law of Property Act*, 1881, is applicable to this case (1).

In *Robertson* v. *Armstrong* (2) a solicitor was authorized by trustees to receive a trust fund and he did so and misapplied it, and the person who paid the fund was discharged from liability. I rely upon the decision in that case. The case of *Hope* v. *Liddell* (3) is also in point. The cases are commented on in

(1) 44 & 45 Vict. c. 41, s. 56. "Where a solicitor produces a deed, having in the body thereof, or indorsed thereon, a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf, from the person who executed or signed the deed or receipt."

(2) 28 Beav. 123.

(3) 21 Beav. 183.

Lewin on Trusts (1) and *Dart's* Vendors and Purchasers (2). The 36th section of the *Conveyancing Act*, 1881, shews what trustees may do and that their receipt in writing for any money "under any trust or power shall be a sufficient discharge for the same." By the 8th section it is enacted that "on a sale, the purchaser shall not be entitled to require that the conveyance to him be executed in his presence, or in that of his solicitor, as such; but shall be entitled to have, at his own cost, the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor." Under all these circumstances, it is submitted that the Board should be ordered to pay the purchase-moneys to the trustees' solicitors on presentation of this deed which has been executed by the trustees.

W. Pearson, in reply:—

The Board in asking that the moneys should be paid into a joint account at a bank acted upon the advice given in *Sugden's* Vendors and Purchasers (3), in *Davidson* on Conveyancing (4), and in *Lewin* on Trusts (5). *Viney* v. *Chaplin* (6) is an authority for the course which the Board has taken. There is no reference in sect. 56 to the position of a vendor who is a trustee. The Board know that the vendors are trustees, and that it is a breach of trust to give authority to solicitors to receive the purchase-moneys, *Ghost* v. *Waller* (7), therefore to allow the moneys to get into the hands of the solicitors or the hands of persons other than the trustees themselves would be a participation in the breach of trust which would render them liable to the persons entitled.

KAY, J.:—

The *Conveyancing and Law of Property Act*, 1881, contains two provisions (sects. 8 and 56) which have been referred to, and which were made necessary by the decision in *Viney* v. *Chaplin*. They were intended to render the completion of purchases more easy and safe to the purchaser.

(1) 7th Ed. p. 406.
(2) 5th Ed. vol. ii. p. 656.
(3) 14th Ed. p. 667.
(4) Ed. 1861, vol. iii. p. 163.
(5) 6th Ed. p. 412.
(6) 2 De G. & J. 468.
(7) 9 Beav. 497.

4 Jur. N.S. 619.

C. A. 1883 ~~ *In re* BELLAMY AND METROPOLITAN BOARD OF WORKS. Kay, J.

The latter section (56) does not refer in any way to the character of vendors, and of course it must apply where the vendors are trustees with a power of sale. The only effect of it is that on a solicitor producing such a deed the purchaser may deal with him just as though he had a power of attorney from his clients enabling him to receive the money.

But then it has been argued that any authority given by trustees for sale to their solicitor to receive the purchase-money would be a breach of trust, and that if the purchaser paid the purchase-moneys to the solicitor he would be implicated in such breach of trust, and in case the money should be misapplied by the solicitor he might have to pay it over again. No direct authority for this argument can be found. The authorities seem to be in this position. In *Webb* v. *Ledsam* (1) Lord *Hatherley* said he knew of no authority for holding a man liable to pay over again purchase-moneys which he has paid to one of several trustees upon a receipt signed by them all. In *Hope* v. *Liddell* (2) a person believing herself to be the devisee of a trustee for sale sold the property and authorized the tenant for life to receive the purchase-money, which the purchaser accordingly paid to him, knowing that the vendor was only selling as trustee. It appears from the argument (3) that the question of the purchaser's liability was raised. The Master of the Rolls decided that the purchaser was bound to pay in such manner as the trustee directed, and that having obeyed the direction of the trustee to pay it to another person he had thereby made a payment of it to the trustee himself, and was exonerated from the consequences of mis-application unless the purchaser had express notice that the person to whom he was directed to pay was about to commit a breach of trust in such a way as to make the purchaser in fact a party to the wrongful act.

"If," said his Lordship, "the trustee had said to the purchaser 'if you pay it to *Norton* it will be the same as if you paid it to me, and I will give you a receipt for the purchase-money,' I do not see in what way the purchaser could have justified any refusal to complete the purchase on the ground that the person so

(1) 1 K. & J. 385. (2) 21 Beav. 183.
(3) 21 Beav. 192.

specified was not duly authorized to receive it, and that the purchaser would incur risk by so paying it." In *Robertson* v. *Armstrong* (1), trustees of a trust fund, which was not the proceeds of real estate, authorized their solicitor to receive it, and he did so and misapplied it, and it was held that where a person is authorized by trustees to receive trust money, and receives it accordingly, the receipt of that money by the agent binds the trustees and discharges the person who pays it.

Reference was made to the text-books of Lord *St. Leonards* on Vendors and Purchasers, Mr. *Lewin*, Mr. *Dart*, and Mr. *Davidson*, all of whom, referring to these authorities, advise a purchaser as matter of precaution to pay his purchase-money either to the trustees themselves, or, as suggested by Lord *St. Leonards*, into a bank in their joint names.

So far as I can gather from the arguments of counsel, and from my own research, it does not appear ever to have been decided that a purchaser from trustees for sale who have power to give receipts, obtaining their receipt and paying the money to their agent by their direction without any ground for anticipating any mis-application of such money, has been held liable in case the money was afterwards misapplied by the agent. Such authority as there is appears to be, as I have pointed out, against such liability. On principle the breach of duty by the trustees is the authorizing an agent to receive the money, and certainly the purchaser takes no part in giving such authority. The trustees of course are liable to their *cestuis que trust* in case the agent should misapply the money, but it would be going very far to make the purchaser liable as well as the agent and the trustees, and in my opinion it is expedient for the more convenient transaction of business, and to save a purchaser from considerable trouble, to hold that he is not liable. In this particular case the solicitors of trustees for sale, who have a power to give receipts for the purchase-money, propose to produce to the purchasers a deed duly executed by the trustees, having in the body thereof, or indorsed thereon, a receipt for the money duly signed by the trustees, and thereupon to require payment of the money to themselves. Assuming that the deed of conveyance is properly

(1) 28 Beav. 123.

C. A. 1883 *In re* BELLAMY AND METROPOLITAN BOARD OF WORKS.

so executed, and the receipt duly signed, and that the purchasers are satisfied of this and have no reason to suspect any intended mis-application of the money, I am bound by the statute and the authorities I have mentioned to hold that they ought to pay the purchase-money to the solicitors, and may do so safely so far as they are concerned. I think there ought to be no costs of this application.

T. F. M.

C. A.

From this decision the Metropolitan Board of Works appealed. The appeal came on to be heard on the 8th of June, 1883.

W. Pearson, Q.C., and *Pownall*, for the Appellants:—

The 56th section of the *Conveyancing Act*, 1881, on which the vendors rely, does not support their case. Before the Act passed the rule was well understood that trustees who had power to give a receipt for purchase-money might authorize an agent to receive it for them if his agency was of such a nature that it was his business to receive money. So a stockbroker may be authorized to receive trust money because it is within his ordinary duty to buy and receive money. But it is not part of the ordinary duty of a solicitor to receive money for his client, therefore a trustee ought not to authorize him to receive it, and if he does he commits a breach of trust, and if the money is lost, the trustee is responsible. It follows as a necessary conclusion that as we know the vendors are trustees we should be participating in the breach of trust in paying the money to them: *Ghost* v. *Waller* (1); *Bourdillon* v. *Roche* (2); *Bostock* v. *Floyer* (3); *Sugden's* Vendors and Purchasers (4); *Davidson's* Precedents in Conveyancing (5); *Lewin* on Trusts (6); *Dart's* Vendors and Purchasers (7). The *Conveyancing Act*, 1881, makes no difference in this respect. The 56th section was passed in consequence of the doctrine laid down in *Viney* v. *Chaplin* (8), where it was held that a solicitor receiving purchase-money must produce an express authority. This the section makes unnecessary; but it

(1) 9 Beav. 497.
(2) 27 L. J. (Ch.) 681.
(3) Law Rep. 1 Eq. 26.
(4) 14th Ed. 667.
(5) Ed. 1861, vol. iii. p. 163.
(6) 6th Ed. p. 413.
(7) 5th Ed. vol. ii. p. 656.
(8) 2 De G. & J. 468.

was not meant to apply to cases where the payment to the solicitor, whether he had express authority or not, would be a breach of trust.

George Henderson, for the Vendors:—

The interpretation put upon the 56th section by the Appellants is a very narrow one. Even before the Act the current of authority was against imposing a liability on the purchaser who paid purchase-money belonging to trustees to their solicitors. Admitting that it would be a breach of trust for the trustees to authorize the solicitors to receive it, it does not follow that the purchaser is liable unless he has reason to suspect *mala fides*: *Webb* v. *Ledsam* (1); *Hope* v. *Liddell* (2); *Robertson* v. *Armstrong* (3). In the last edition of *Lewin* on Trusts (4) his opinion appears to be modified on the question. There is no reason why a trustee should not authorize his solicitor to receive purchase-money. A trustee may do what an ordinarily prudent man would do in managing his own business, *Speight* v. *Gaunt* (5), and in some cases, as for instance where the trustees are in different parts of the world, it is absolutely necessary to employ an agent to receive the money.

That being so, the 56th section applies to the case of a solicitor employed by a trustee as well as to other cases. The words of the section are quite general. In sect. 8, and elsewhere, the Act treats the solicitors for the parties as the proper persons to carry the transaction through. And if the solicitor is authorized to receive the money the purchaser cannot resist the obligation of paying it to him.

W. Pearson, in reply.

June 26, 1883. BAGGALLAY, L.J., after stating the facts as set forth above, said:—

On the part of the Appellants it has been contended before us, as it appears to have been contended before Mr. Justice *Kay*,

(1) 1 K. & J. 385.
(2) 21 Beav. 183.
(3) 28 Beav. 123.
(4) 7th Ed. p. 406.
(5) 22 Ch. D. 727.

C. A. 1883 *In re* BELLAMY AND METROPOLITAN BOARD OF WORKS. Baggallay, L.J.

that an authority given by trustees for sale to their solicitor to receive the purchase-money would be a breach of trust; and that if the purchaser paid his purchase-money to the solicitor upon such an authority he would be implicated in the breach of trust, and might be called upon to repay the purchase-money in the event of its being misapplied by the solicitor. The former of the two propositions thus affirmed is, in my opinion, well founded: and as a general proposition it has not been disputed by the Respondents. Lord *Langdale's* decision in *Ghost* v. *Waller* (1) has always been recognised and followed. But I am not aware of any authority that supports the latter proposition as applicable to any cases other than those in which, from the surrounding circumstances, knowledge, or at least a suspicion, of an intended misapplication of the purchase-money has been attributed to the purchaser. The cases of *Webb* v. *Ledsam* (2), and *Hope* v. *Liddell* (3), so far as they have any bearing on the general proposition, appear to me to be adverse to the Appellants' contention.

In *Webb* v. *Ledsam* the purchaser, by arrangement with the trustees, retained in his own hands for eight years a considerable portion of the purchase-money, and eventually paid it to one of the trustees, who misapplied it. Here there was a clear breach of trust, of which the purchaser was not only cognizant, but took an active part in carrying it out; the Vice-Chancellor held the purchaser responsible by reason of his participation in what he knew to be a breach of trust, but in the course of his judgment he said (4), "I know of no authority for holding a man liable to pay over again purchase-money paid to one of several trustees upon a receipt signed by them all;" and then proceeded to distinguish the case that was under his consideration. In *Hope* v. *Liddell* (5) Lord *Romilly* said: "The purchaser having obeyed the direction of the trustee to pay it (*i.e.*, the purchase-money) to another person, has, in my opinion, thereby made a payment of it to the trustee himself, and is exonerated from the consequences of mis-application, unless the purchaser had express notice that

(1) 9 Beav. 497.
(2) 1 K. & J. 385.
(3) 21 Beav. 183.
(4) 1 K. & J. 388.
(5) 21 Beav. 202.

C. A. 1883

In re BELLAMY AND METROPOLITAN BOARD OF WORKS.

Baggallay, L.J.

the person to whom he was directed to pay it was about to commit a breach of trust in such a way as to make the purchaser in fact a party to the wrongful act."

The case of *Viney* v. *Chaplin* (1), though alluded to by Mr. Justice *Kay* in his judgment, does not appear to have been much discussed in the arguments of counsel before him, but I agree with Mr. Justice *Kay* in thinking that the 8th and 56th sections of the *Conveyancing Act* of 1881 were passed with reference to the views expressed by the learned Judges by whom *Viney* v. *Chaplin* was decided. In that case two questions were raised—the first, whether a purchaser has a right to insist upon having the conveyance executed in the presence of himself or of his agent; and the second whether he has a right to require that the money should be paid to the vendor personally or in his presence. Upon these two questions the Court (composed of Lord Chancellor *Chelmsford* and Lords Justices *Knight Bruce* and *Turner*), declined to give an opinion in the abstract; but in the course of his judgment the Lord Chancellor, after stating that under ordinary circumstances the purchaser's solicitor had no hesitation in accepting the conveyance, though he had not witnessed its execution, or in permitting his client to pay the purchase-money to the solicitor of the vendor, but that circumstances might arise in which the purchaser might feel that he ought to be armed with the most complete proof of the transaction, both as to the execution of the conveyance, and as to the receipt of the purchase-money, and after further observing that if the purchaser paid his purchase-money to a person not authorized to receive it he would be liable to pay it over again, and that the possession of the executed conveyance, with the signed receipt for the purchase-money indorsed, was not in itself an authority to the solicitor of the vendor to receive the purchase-money, he proceeded as follows (2): "The difficulty is to see how the purchaser can be safe at all times from the danger of paying his money to an unauthorized person without the vendor being present, or having expressly given to the purchaser or his solicitor authority to pay it in a particular manner." And after further observing that in many cases it would be extremely unreasonable for the purchaser to

(1) 2 De G. & J. 468. (2) 2 De G. & J. 477.

C. A. 1883

In re BELLAMY AND METROPOLITAN BOARD OF WORKS.

Baggallay, L.J.

require the presence of the vendor, he added (1): "It will be sufficient for this case to say that if a purchaser has not the right in every case to insist upon the vendor being present when the purchase-money is to be paid, neither is a vendor entitled to refuse compliance with a request of this description when circumstances arise which are sufficient to justify it." And in the same case Lord Justice *Turner*, after stating that a solicitor was not entitled by virtue of his office to receive purchase-money, and that if a vendor asserted the authority of his solicitor to receive it it was incumbent upon him to produce that authority, proceeded to express himself as follows (2): "I think that the purchaser had the right of insisting either that the vendor should attend and himself receive the purchase-money, or of requiring that there should be written authority to pay the solicitor."

Much reliance has been placed by the Appellants upon the opinions of text-writers, and we have been told in the course of the argument that *Hope* v. *Liddell* (3) has not been approved by conveyancers, but nearly thirty years have elapsed since the decision in that case, and I am not aware that its authority has ever been impugned; it was quoted in *Viney* v. *Chaplin* (4), and no disapprobation of it was expressed; and the decision in *Viney* v. *Chaplin* was perfectly consistent with it. We are all aware of the advice given by Lord *St. Leonards*, that when the vendors are trustees for sale the purchasers should, for their own protection, either pay the money to the vendors or into a bank to the joint account of the trustees; that advice was given many years ago, and was, in my opinion, sound advice for general guidance; and for this reason, that if at any future time the authority of the agent should be disputed, or it should be sought to affect the purchaser with knowledge or suspicion of an intended misapplication of the purchase-money, it might be difficult for the purchaser or his representatives to prove the one, or disprove the other. That advice has been repeated in the books of other writers, and it appears to have been adopted in practice by conveyancers generally; it was doubtless the foundation of the requisition made on behalf of the Appellants in the present case,

(1) 2 De G. & J. 478.
(2) Ibid. 482.
(3) 21 Beav. 183.
(4) 2 De G. & J. 468.

C. A.
1883
In re BELLAMY AND METROPOLITAN BOARD OF WORKS.
Baggallay, L.J.

but it was not advice which ought in all cases to be acted upon, if effect is to be given to the views expressed in *Viney* v. *Chaplin* (1); and Lord *St. Leonards* in the 14th edition of his great work, published some two or three years after the decision on the appeal in *Viney* v. *Chaplin*, first refers to the decision of Vice-Chancellor *Kindersley* (2) as supporting the proposition "that, as a general rule the purchaser had a right to pay the purchase-money to the seller himself," and adds that "on appeal it was considered that a written authority would be sufficient, but the solicitor *as such* had no right to receive the money." Whatever may have been Lord *St. Leonards'* opinion of the views expressed by Lord *Cranworth* and Lord Justice *Turner* in *Viney* v. *Chaplin*, he expressed no dissent from them. In the last edition also of Mr. *Lewin's* work on Trusts, the following passage occurs: "Trustees as between themselves and the purchaser are not bound to receive the purchase-money personally, but may give *a written or other express authority* to their solicitor or agent to receive it on their behalf, but payment to a solicitor or agent without a written or other express authority from them will not be sufficient." In my opinion these comments of Lord *St. Leonards* and Mr. *Lewin* correctly represent the principles recognised and acted upon by Courts of Equity previously to the passing of the Act of 1881, when dealing with questions such as are involved in the present appeal; it is impossible to state them more concisely, but with the view of applying them to the case now under consideration I would enunciate them as follows—that in the absence of any reason to suspect a misapplication of the purchase-moneys a purchaser from trustees for sale would be bound to pay them to the solicitor of the trustees upon the production by him of a written authority, signed by the trustees, to receive them.

Let us now examine the 8th and 56th sections of the Act of 1881. The 8th is in the following terms: "On a sale, the purchaser shall not be entitled to require that the conveyance to him be executed in his presence, or in that of his solicitor, as such; but shall be entitled to have, at his own cost, the execution of the conveyance attested by some person appointed by him, who may if he thinks fit, be his solicitor." This deals with the

(1) 2 De G. & J. 468. (2) 4 Drew. 237.

C. A. 1883

In re BELLAMY AND METROPOLITAN BOARD OF WORKS.

Baggallay, L.J.

subject-matter of the first question raised in *Viney* v. *Chaplin* (1), as to which their Lordships, while declining to lay down any general rule applicable to all cases, in effect held that the question whether a purchaser in any particular case had a right to insist upon having the conveyance executed in the presence of his solicitor or his agent must depend upon the circumstances of that case. The 8th section gives to the purchaser the right of having, but at his own cost, the execution of the conveyance attested by some person appointed by him, who may be his own solicitor, but negatives any right in him to require that the conveyance shall be executed in his presence or in that of his solicitor, as such. The 56th section of the Act of 1881 in like manner deals with the subject-matter of the second question raised in *Viney* v. *Chaplin* as follows:—[His Lordship read the section.] It has been suggested, though it has hardly been pressed, that this 56th section does not apply to the case of a sale by trustees, but I can see nothing either in the section itself or elsewhere in the Act to justify so limited an application of its provisions. Treating the section as applicable to the present case, and assuming the views which I have expressed as to the effect of the decision in *Viney* v. *Chaplin* to be correct, the 56th section, in my opinion, substitutes the production of the deed as mentioned in the earlier portion of the section for the written authority, which, according to the decision in *Viney* v. *Chaplin*, would have been sufficient. I may remark that in the arguments before us the vendors have been throughout treated as trustees for sale, with power to give receipts; but it appears that they are not trustees for sale, as the expression is commonly understood; the estates are strictly settled by the will with a power to the trustees upon request as therein mentioned to sell and to revoke uses and trusts to give effect to such sales with a declaration that their receipts shall be effectual discharges for the purchase-moneys thereby expressed to have been received, and that the persons taking such receipts shall not be obliged to see to the application or be in any wise answerable or accountable for any loss, misapplication, or non-application thereof. The distinction does not appear to me material, but the provision as to the purchaser not being

(1) 2 De G. & J. 468.

liable for misapplication of the purchase-moneys brings the case more completely within the decision in *Hope* v. *Liddell* (1). I will only add that, in my opinion, the 56th section of the Act of 1881 was intended to meet the circumstances of such a case as the present, and to prevent in like cases such a requisition being made as has been made by the Appellants. I think the appeal should be dismissed.

Cotton, L.J.:—

This case comes before us on appeal from an order made by Mr. Justice *Kay* upon a summons taken out under the *Vendor and Purchaser Act*. The purchasers made a requisition that the vendors should either personally receive the money or name some bank to which it should be paid to the joint account of the vendors, who were trustees. Their solicitors, without any explanation of any circumstances which rendered it desirable or necessary that neither of those alternatives should be adopted, said: "We will produce a conveyance in which there shall be a receipt for the purchase-money, that is sufficient authority, we claim under that to receive the purchase-money and to disregard your requisitions." The question which we have to consider is whether upon the answer so made by the vendors they are entitled to specific performance. Now the first point, which was argued a good deal, was upon the 56th section of the *Conveyancing and Law of Property Act*, 1881, and it was contended that however the matter would have stood in the absence of that section, that section prevented the requisition made by the purchaser from being insisted on in the case where the trustees are vendors. In my opinion that is not a correct reading of that section. In my opinion the simple effect of that section is to make a deed in the form pointed out equivalent to a special authority given to the solicitor to receive the money. What is the section? [His Lordship read the section.] That on its fair interpretation points simply to the absence of a separate or special direction or authority. In my opinion it means that the production of the deed shall be equivalent to and obviate the necessity of a separate or other direction or authority. If it

(1) 21 Beav. 183.

C. A. 1883 ~~ *In re* BELLAMY AND METROPOLITAN BOARD OF WORKS. Cotton, L.J.

was meant that this should be a good discharge under all circumstances to the person who so paid the money the clause would have been in different language, and although I do not say that this section does not apply to the case of trustees being vendors, where possibly they may be right in authorizing their solicitor, under certain circumstances, to receive the money, yet, in my opinion, that applies only to vendors who have power to authorize their solicitors to receive the money, and does not give vendors any additional power of authorizing their solicitors to receive the money, or give to the purchaser any additional safety in payment to a solicitor who produces the deed, except this, that the deed shall be equivalent to and have the same force and authority as a separate and special written authority or direction.

If that is the true construction of this section what we have to deal with are two questions. Have trustees power to authorize their solicitor to receive purchase-money payable to them? And then we must consider whether a purchaser is bound to accept the receipt of the solicitor instead of paying the money to the trustees personally or to their account. I think it may be safely stated as a general rule under ordinary circumstances that trustees are not justified in authorizing their solicitors or other agent to receive purchase-money which ought to be paid personally to them. But that is not in any way, in my opinion, a universal rule. There may be circumstances which would justify and render it necessary for trustees to grant power to somebody else to receive purchase-money for them, but as a general rule I think it may be safely laid down that it is their duty not to authorize or delegate to an agent or solicitor the power to receive the money. It was argued that it was part of the ordinary course of business to employ a solicitor in completing a purchase, and then it was said that the case before the Court of Appeal of *Speight* v. *Gaunt* (1) would be an authority that trustees would be justified in doing what was the usual course of business and allowing the solicitor to have authority to receive the money. I entirely agree with the case referred to, but it has no application to the present case. That case simply decided that when, according to the ordinary course of business, it is necessary for trustees

(1) 22 Ch. D. 727.

to employ an agent, having from the very nature of his employment power to receive money, the trustees are not committing a breach of trust in employing such an agent, nor are they answerable for his mis-application of the money. The case there was that of a broker on the *Stock Exchange*, who was instructed to invest trust money. But here it is an entirely different case. A solicitor, as such, and from his employment in completing a purchase, has not authority to receive the money. *Viney* v. *Chaplin* (1) settled that. The question is as to a special authority given to him, not incident to his employment on the completion of a purchase, but a special authority given to him under the terms of this section. Therefore that case is no authority.

That being so, and taking into account the general rule, can the vendors require the purchaser to complete in this way, simply by saying to the purchaser "I require completion on payment of the purchase-money to my solicitor," not deigning to give any explanation of circumstances which would justify or render it necessary for the trustees to authorize him to receive the money, but simply saying, "Here is the conveyance. Here is the Act—you are bound to pay the money to me?" In my opinion that is not sufficient. Assuming that there may be circumstances where the trustees would be justified in authorizing the solicitor to receive the purchase-money, it is not said in sect. 56 that the purchaser shall be bound to pay it in that way. But in my opinion when the vendor's solicitor requires the purchase-money to be paid to him simply under this section the purchaser has a right to say "I may be safe, and I by no means say that I am not, but I do not choose to mix myself up with any investigation which may hereafter arise between the *cestuis que trust* and their trustees." I think a purchaser is justified in saying, "I will be prudent and cautious, and I require payment of the moneys to the trustees or to the joint account with their bankers designated by them."

It is said there is authority against that. Now undoubtedly high authorities on conveyancing in their text-books have advised trustees to adopt the course laid down by these requisitions. It is said there have been alterations in the later editions, and

(1) 2 De G. & J. 468.

C. A. 1883 *In re* BELLAMY AND METROPOLITAN BOARD OF WORKS. Cotton, L.J.

possibly there have, but I do not think the authority of Lord *St. Leonards* can be vouched for the proposition which was involved in the decision of Mr. Justice *Kay*, of which I speak with great respect, as of course I need hardly say I do also the opinion of the Lord Justice who has preceded me. We must look to see whether that case of *Viney* v. *Chaplin* (1), which was referred to by Lord *St. Leonards*, not as laying down a doctrine he approved of, but as altering the practice, decided anything of the kind. Now that the Lord Chancellor did not intend to decide what should be done where there were trustees vendors, and the purchaser desired to be prudent and safe, is clear from what he says, for he says (2), "Neither is it necessary to consider whether Mr. *Chaplin* was or was not a trustee, although the cases shew that where there is a trust a purchaser may incur considerable risk in paying to a solicitor for the trustee, for this is merely a question of degree."

So that he certainly did not intend to lay down any opinion, or by his judgment in any way to give an opinion, on this question we have now to consider; nor, as far as I see, does Lord Justice *Turner*; because the facts there were these, that the solicitor had no written authority at all, but insisted on his right from his mere position as a solicitor, or from a verbal authority given him. It is very true that he does refer to the non-existence of a special authority, but that is when he is dealing with the questions whether the solicitor was then in a position to say that as between him and his employer, the vendor, he could give a good discharge, which would prevent the vendor from afterwards saying, "I insist on my vendor's lien, that payment has never been effectually made to me."

But here it is different. It is not a question between vendor and purchaser whether the vendor can afterwards object to the payment to the solicitor, but whether the purchaser would be safe in paying to the solicitor, whether he is not prudent and justifiably prudent—not over cautious, but justifiably prudent—in saying, "I will not specifically perform until I am made safe from any future question, by you allowing me to pay the money to the trustees as the vendors, or to an account in their names at a bank." In my opinion he was justified in taking that course,

(1) 2 De G. & J. 468. (2) 2 De G. & J. 479.

and therefore, in my opinion, the decision of Mr. Justice *Kay* must be reversed.

BOWEN, L.J.:—

I agree with the opinion of Lord Justice *Cotton* in this matter. It seems to me the questions we have to decide are two; first, whether the *Conveyancing Act*, 1881, affects the position of the solicitor of the trustee in respect of the question which has been raised; and, secondly, what really was the law of the Court as to payment made to solicitors of trustees before the Act.

I begin by saying what in my opinion is the true construction of sect. 56 of the *Conveyancing Act*, 1881. I think its only effect is to make a vendor's receipt of the character described in the section equivalent for the purpose of the protection of the vendee to a written direction of the vendor. I do not think the section is meant to compel the purchaser to accept a written receipt, where he would not before the Act have been compelled to act on a written direction; and it seems to me that the whole framework of the section points to its being intended for the protection of a purchaser who acts on a receipt without having any written authority; that is to say, to place the purchaser who acts on such a receipt in the same position as if a written authority had been handed to him by the vendor.

I do not say, and I do not think it can be said, that this section does not apply to the case of trustees. It appears to me that it applies to the case of any trustee who would be right in authorizing his solicitor to receive the purchase-money upon a written direction. All that seems to me to be clear is, that it does not enlarge the power of trustees as to the employment of a solicitor, but leaves it exactly where it was before.

Next comes the question what was the law before as to the employment by trustees of a solicitor to receive the purchase-money. It appears to me there can be no invariable rule on the subject. The employment of a solicitor by a trustee to receive purchase-money from purchasers must depend on the general principles which regulate the conduct of trustees. Sometimes the trustee would find it essential to employ a solicitor to receive the purchase-money. For example, a case was put in argument which

C. A. 1883 *In re* BELLAMY AND METROPOLITAN BOARD OF WORKS. Bowen, L.J.

was an apt illustration. Suppose a trustee is abroad, you cannot expect a purchaser to be hunting all over the globe for the purpose of finding the man to whom he is to pay the money. That would be unreasonable, and I can conceive many cases in which it would be reasonable that he should employ a solicitor to receive the purchase-money, but still a solicitor, to use the language of a Judge in a well-known case, is not employed to receive the purchase-money except in the case of moral necessity. It must depend upon the circumstances of each case whether he was properly so employed or not, and therefore I do not propose to lay down any general rule as to whether the purchaser will or will not be safe in his employment of a solicitor to receive the purchase-money. It seems to me sufficient to say, speaking with great consciousness of my own inferiority to judge on this question as compared with that of the learned Lords Justices who have preceded me, that I do not think it can be said that a purchaser would have been compelled before the Act to pay to the solicitor of the trustees, if the trustees simply wrote to say they wished him to do so, and the purchaser simply said in return that he wished to run no risk.

Then if that be so, what is there in sect. 56 of this Act which alters the position of the vendor and vendee? If I am right in the construction I put on sect. 56 it is not meant by that section to enlarge the power of trustees to employ a solicitor. I think it would not justify the Court in insisting on a purchaser now doing in respect to the purchase-money what the Court would not have insisted on his doing before.

The decision appealed from was accordingly reversed.

Solicitors: *R. Ward; Hunters, Gwatkin & Haynes.*

M. W.

In re PEACE & WALLER.

C. A. 1883 July 4.

Married Woman—Costs—Receiver—Taxation of Solicitor's Bill—Solicitor's Act (6 & 7 *Vict. c.* 73), *s.* 43 [*Revised Ed. Statutes. vol. ix. p.* 132]—*Judicature Act*, 1873, *s.* 25, *sub-s.* 8.

M., a married woman, by her next friend, applied to tax the bill of costs of her solicitor incurred in a suit relating to her separate estate. After the Taxing Master's certificate had been filed, an order was made on the application of the solicitor, directing an inquiry of what *M.*'s separate estate consisted at the date of the filing of the certificate capable of being reached by the judgment and execution of the Court, and appointing a person to receive it until the amount found due on taxation was paid:—

Held, that this order was proper, and that it was not necessary to take separate proceedings by action to enforce the demand against the separate estate.

ON the 14th of November, 1882, on the petition of *Sarah Ann Meakin*, the wife of *E. E. Meakin*, by *A. H. Meadows* her next friend, in the matter of *Peace & Waller*, solicitors, alleging that the Plaintiff by *Meadows*, her next friend, employed Messrs. *Peace & Waller* as her solicitors in a Chancery action of *Meakin* v. *Morrow;* that the said solicitors on the 16th of October, 1882, delivered to the Petitioner their bill of fees and disbursements, and that the Petitioner submitted to pay what should be found due to the said solicitors on the taxation of their bill, the common order was made for taxation of the bill with all usual directions.

The action in question related to the separate estate of Mrs. *Meakin.*

On the 22nd of December the Taxing Master made his certificate, filed on the 23rd, whereby he certified to the effect that the bill having been laid before him amounting to £116 17*s.* 10*d.* he had taxed it at £107 13*s.* 4*d.*, and the amount taken off being less than a sixth he had taxed the solicitors their costs of the reference at £7 17*s.* 8*d.*, and he found that having regard to the costs of the reference there remained due from the Petitioner to Messrs. *Peace & Waller* the sum of £115 11*s.*

On the 2nd of March, 1883, on motion by Mr. *Peace* (Mr. *Waller* having died), Vice-Chancellor *Bacon* made an order in the matter, directing an inquiry of what the separate estate of Mrs. *Meakin* consisted on the 23rd of December, 1882, and whether any and

C. A. 1883 *In re* PEACE & WALLER.

what disposition thereof or dealing therewith by Mrs. *Meakin* had been made since that date, and of what that separate estate now consisted, and whether any and what parts thereof still remained capable of being reached by the judgment and execution of the Court. And it was ordered that "a proper person be appointed to collect, get in, and receive such separate estate as shall be certified to be capable of being reached as aforesaid and the dividends and income thereof" until the amount found due by the Taxing Master's certificate and the costs of the application were paid.

Mrs. *Meakin*, by her husband as her next friend, appealed against this order.

Oswald, for the appeal:—

The Vice-Chancellor followed his own decision in *Bryant* v. *Bull* (1), but I submit that the order cannot be supported. There is no jurisdiction under the *Solicitors Act* to appoint a receiver of the estate of a *feme coverte*. All the forms of order in *Seton* on Decrees and *Pemberton* on Decrees point to proceedings being taken by action to enforce claims against the separate estate of a married woman. The case is not that of a final judgment, as in *Salt* v. *Cooper* (2). A receiver could not be appointed in the absence of the trustee.

[COTTON, L.J.:—I see no objection on that ground. The receiver is appointed over the head of the married woman not of the trustee.]

There is no effective submission to pay in the order, for a next friend cannot bind the estate of a married woman by his submission. There cannot be any proceedings to affect separate estate beyond declaring its liability, unless the trustee is present: *Collett* v. *Dickenson* (3). The husband must be a party to a suit to charge separate property which became such under the Act of 1870: *Hancocks* v. *Lablache* (4). This is in no sense equitable execution and does not come within *Anglo-Italian Bank* v. *Davies* (5).

(1) 10 Ch. D. 153.
(2) 16 Ch. D. 544.
(3) 11 Ch. D. 687.
(4) 3 C. P. D. 197.
(5) 9 Ch. D. 275.

Marten, Q.C., and *Swinfen Eady, contrà.*

[COTTON, L.J.:—The next friend was the party liable to the costs, so how do you charge them on the separate estate of the married woman.]

The married woman being liable to indemnify her next friend out of her separate estate obtained taxation under the third party clause. [They were then stopped by the Court.]

COTTON, L.J.:—

This is an application to discharge an order of Vice-Chancellor *Bacon*, made in the matter of a solicitor, appointing a receiver of the separate estate of a married woman until payment of what has been found due on taxation of the bill of costs of the solicitor incurred in a suit relating to her separate estate. The order for taxation, which was made in the matter only, contains the usual submission to pay. Under 6 & 7 Vict. c. 73, s. 43, payment of the amount certified to be due may be enforced according to the course of the Court. The mode of enforcing a claim against separate property is to obtain equitable execution by an order appointing a receiver or directing the trustees to pay. Such an order may be obtained in a suit brought for that purpose, or, in my opinion, where proceedings are already pending it may be made in those proceedings without any fresh suit. This question was discussed in *Anglo-Italian Bank* v. *Davies* (1), and it appears to me that the order under appeal is not an improper way of enforcing the submission. The objection was urged that the trustees of the separate estate are not here, but it is not necessary that they should be here in order to establish a claim against the separate estate. No order can be made upon them unless they are here, but an order may be made declaring the demand payable out of the separate estate. One way of enforcing that demand is by the appointment of a receiver who does not interfere with the possession of the property by the trustee, but receives from them whatever they would otherwise have paid to the married woman. The order might be more carefully worded. It would be well to express that it is subject to the rights of the trustees,

(1) 9 Ch. D. 275.

C. A. 1883 *In re* PEACE & WALLER.

and it would also be right to direct the inquiry only to the separate estate to which she is entitled without any restraint on anticipation. These alterations of detail however do not affect the costs of the appeal, which in my opinion fails.

BOWEN, L.J., concurred.

Solicitor for Appellant: *F. J. Wood.*
Solicitors for Respondent: *Peace & Co.*

H. C. J.

C. A. 1883 CHITTY, J. *May* 4. C. A. *July* 4.

In re CAPITAL FIRE INSURANCE ASSOCIATION.

Solicitor—Lien on Documents—Winding-up.

An order having been made for winding up a company, applications were made by the official liquidator against *B.*, a solicitor employed by the company before the winding-up, that *B.* might be ordered to deliver up the following documents: 1. The share register and minute book, which were in *B.*'s hands before the commencement of the winding-up: 2. Other documents which came to *B.*'s hands after the presentation of the winding-up petition, but before the winding-up order; 3. Documents relating to allotments of shares which had come to *B.*'s hands before the presentation of the petition. *B.* resisted the applications on the ground that he claimed a lien. Mr. Justice *Chitty* ordered that all the documents should be delivered to the liquidator subject to the lien, if any, of *B.*:—

Held, on appeal, that the order was right as regarded the share register and minute book, for that the directors had no power to create any lien on them which could interfere with their being used for the purposes of the company:

Held, also, that the order was right as to class 2; for that a solicitor could not assert against documents which came to his hands pending the winding-up any such lien as would interfere with the prosecution of the winding-up.

But *held*, that the order for delivery of class 3 must be discharged, for that the winding-up order could not defeat any valid lien existing at the time when the winding-up petition was presented.

Belaney v. *Ffrench* (1) and *Boughton* v. *Boughton* (2) distinguished.

A PETITION for winding up this company was presented on the 18th of September, 1882, and on the 26th of October was dismissed by Mr. Justice *North*. Several actions for calls had before

(1) Law Rep. 8 Ch. 918. (2) 23 Ch. D. 169.

the 18th of September been commenced against shareholders, and on the dismissal of the petition they were proceeded with. The Petitioner appealed from the dismissal, and ultimately on the 5th of February, 1883, the Court of Appeal made a winding-up order.

Mr. *Beall* had been solicitor for the company, and had acted for it in the above actions against shareholders.

On the 17th of February the parties having the conduct of the winding-up order took out a summons for an order on Mr. *Beall* to deliver to the provisional liquidator the following books of the company, namely, the minute book, agenda book, *London and County Bank* pass book, share ledger, ledger, cash book, register of transfers, and all other books of the company which were in his possession. *Beall* resisted this application on the ground that he had a lien on the above documents for his costs. On the 13th of March, 1883, Mr. Justice *Chitty* made an order for delivery of the above documents to the provisional official liquidator, such delivery to be subject to the lien (if any) of *Beall* on the said books.

At the time when this order was made it had not been shewn at what time the books came into *Beall's* possession. He applied to discharge this order, and in support of his application filed an affidavit that the minute book and share register were in his possession before the 18th of September, 1882. The motion was heard before Mr. Justice *Chitty* on the 4th of May, 1883.

The articles of association provided that a minute book containing a record of the proceedings of the directors should be kept, and contained provisions which in the opinion of the Court made it obligatory on the directors to keep it in their possession so that it could be produced whenever required for any of the purposes of the company.

Romer, Q.C., and *Northmore Lawrence*, in support of the motion:—

We contend that the solicitor has against the liquidator the same lien with respect to costs, whether incurred before or after the winding-up, as he would have had against the company if not wound up. With respect to the costs incurred before the

C. A. 1883 *In re* Capital Fire Insurance Association.

winding-up it is clear he has a lien: *In re South Essex Estuary Company* (1); and, with respect to those incurred after, he has the same lien which a wharfinger would have upon goods warehoused with him. Such lien is not within sect. 153 of the *Companies Act*, because it cannot be called a disposition but a simple retention, for the lien is the same although the amount enforceable may be increased. As in the case of a wharfinger, the lien has its origin when the property first came into his hands, so in the case of a solicitor, the only disposition of the company's property in respect of which the lien is claimed occurred when the documents first came into his hands. Therefore the acts of the company giving rise to the lien cannot be said to be a disposition within the 153rd section.

Ince, Q.C., and *Pinsent*, for the liquidators:—

The proper order to make is for delivery up of the documents without prejudice to the lien, by analogy to the practice in administration actions: *Belaney* v. *Ffrench* (2); *Boughton* v. *Boughton* (3).

Romer, in reply:—

Administration actions stand on a different footing, because other parties have an interest in the documents.

Chitty, J.:—

This is a motion by the former solicitor of a company now being wound up by the Court to discharge an order made in Chambers, the order being that he should deliver over the documents in his possession to the official liquidator without prejudice to his lien.

It is not stated by the solicitor in his affidavit, neither by the affidavit which was before me in Chambers, that the documents came into his possession as solicitor, but I understand that the official liquidator has very properly made an admission that the documents, such as he has, did come into his custody or possession in his character as solicitor.

(1) Law Rep. 4 Ch. 215. (2) Law Rep. 8 Ch. 918
(3) 23 Ch. D. 169.

When the matter was before me in Chambers it did not appear that any of the documents had come into his possession previously to the commencement of the winding-up, but an affidavit has been subsequently made and not objected to, from which it appears that two books—the share register and the minute book of the directors, came into his possession before the commencement of the winding-up, that is before the presentation of the petition. In these circumstances it is said on the part of the solicitor, that he is entitled to have the order discharged on the ground that he has a lien for the costs and the general balance of account between himself and the company.

I should say that there has been no imputation whatever made on the solicitor in this case. None has been made at the Bar, and I say this that there may be no mistaking my judgment that he appears to have acted throughout this matter with perfect propriety, that no imputation could have been made on his conduct in the matter, and he has brought before the Court the simple question of law.

On the general question, Lord *Hatherley* decided in the case of *In re South Essex Estuary Company* (1) that after a winding-up order the former solicitor for the company could be compelled to produce the documents relating to the company, such production to be without prejudice to his lien for costs. That of course is an authority which has not been questioned before me, nor could it be, it is authority that an order of that kind can be made although its effect is to make a solicitor's lien very nearly worthless. The Court of Appeal in *Belaney* v. *Efrench* (2) held that the solicitors for the trustees of an estate under the administration of the Court had not, after their discharge, such a lien for costs and money advanced in the suit as would enable them to refuse production of documents.

The Lord Justice *James* said (3): "A solicitor cannot embarrass a suit by keeping papers which belong to an estate which is being administered by the Court, and cannot use that means of obtaining payment." The same point, apparently, came before Mr. Justice *Fry*, in *Boughton* v. *Boughton* (4), when, following

(1) Law Rep. 4 Ch. 215.
(2) Ibid. 8 Ch. 918.
(3) Law Rep. 8 Ch. 920.
(4) 23 Ch. D. 169.

C. A. 1883 *In re* CAPITAL FIRE INSURANCE ASSOCIATION. Chitty, J.

Belaney v. *Ffrench* (1), he held that the solicitor was to deliver over such papers in his possession as might be necessary from time to time for carrying on proceedings in the action, but without prejudice to his lien, and to be returned to him if and when Judge should so direct.

The state of the law appears to be this. The only distinction between the decision of Lord *Hatherley* in *In re South Essex Estuary Company* (2) and the decision of the Court of Appeal in *Belaney* v. *Ffrench*, is that Lord *Hatherley* decided that production was to be made, but did not decide against the proposition that the solicitor was bound to make delivery of the papers, and the Court of Appeal did decide that delivery should be made. There is no inconsistency between those two cases. The latter, *Belaney* v. *Ffrench*, of course binds me sitting here. It appears to me that that is the better form of order to make, because, as I have already said, the production of the documents practically destroys a solicitor's lien, and the delivery renders the administration of the estate under administration in Court more convenient and less expensive.

The only difference is this, and a difference which applies to this case, namely, that the solicitor who is only under an order for production (now I am applying the principle to the exact state of facts before me) can compel the official liquidator to employ clerks to go to his office whenever the books are required to be seen, which involves the estate in great expense, and the one advantage that there is to the solicitor arises by reason of the circumstance that he can put the estate to somewhat greater costs, and may, probably, by that embarrassment, that worrying, that harassing of the liquidator, have a better chance of getting his demand settled. When the Court in *Belaney* v. *Ffrench* adopted the principle that the solicitor was bound to produce it almost followed that the more convenient form of order was for the delivery. Whether that is so or not, I have now the decision of the Court of Appeal, and also of Mr. Justice *Fry*, that the proper order is delivery.

Now it cannot be for one moment contended that the liquidation of a company under the Winding-up Acts is not an adminis-

(1) Law Rep. 8 Ch. 918. (2) Law Rep. 4 Ch. 215.

tration of an estate by the Court, and in addition to what I have said with reference to the law, there are one or two sections in the Act itself which shew that the liquidator ought to have the documents. There is the 154th section: "Where any company is being wound up, all books, accounts, and documents of the company and of the liquidators shall, as between the contributories of the company, be *primâ facie* evidence of the truth of all matters purporting to be therein recorded," evidently contemplating that these documents shall be ready to be produced whenever required for the purpose. Then the 155th section enacts: "Where any company has been wound up under this Act and is about to be dissolved, the books, accounts, and documents of the company and of the liquidators may be disposed of in the following way: that is to say, where the company has been wound up by, or subject to the supervision of the Court, in such way as the Court directs, and where the company has been wound up voluntarily, in such way as the company by an extraordinary resolution directs." And there is the 156th section also, which gives the Court power when the winding-up is by the Court or subject to its supervision to make such order for the inspection by the creditors and contributories of the company's books and papers as the Court thinks just. That also is a section which shews, as a matter of convenience, that the books and papers of the company ought to be in the possession of the officer of the Court who is to undertake the administration of the estate. I mention this as an additional ground for the order that has been made in this case.

There is another point which arises, and that is this, that Mr. *Beall's* affidavit, filed for the purpose of the present motion, shews that two books, as I have mentioned, and only two, came to his custody before the commencement of the winding-up. The first is the register of shareholders, which is more technically described in the 32nd section of the *Companies Act*, 1862, as the register of members, and is to be kept at the registered office of the company, with certain exceptions, during business hours, subject to reasonable restrictions, and so forth, and is to be open for inspection, and so forth. The company in this case employed the solicitor by their agents the directors; but it would be a

C. A. 1883 *In re* Capital Fire Insurance Association. Chitty, J.

breach of duty on the part of the directors to allow the register of members to be removed from the place where the Act of Parliament says it ought to be kept, consequently I hold that the solicitor cannot under any circumstances obtain a lien on the register, even if the company were itself at a general meeting to pass a resolution that he should have it, because there are more persons than the company interested in the register of members, namely, creditors and others who have a right to inspect; that disposes of the register. Then in regard to the minute book and other documents the articles of association provide that minutes of the proceedings of every general meeting are to be kept. The minute book is the minute book of the company, and, as I read the articles, the directors, as between themselves and the members, have no power (seeing that the directors are merely the agents of the company), to make any disposition of the books which would be inconsistent with the articles, that is to say, any disposition which would preclude them from producing them under the section of the Act. I hold, therefore, that with respect to the minute book the solicitor has no lien as against the company. That practically disposes of the question.

There is the further point with reference to the 153rd section of the *Companies Act*, which provides that "where any company is being wound up by the Court or subject to the supervision of the Court, all dispositions of the property, effects, and things in action of the company, and every transfer of shares or alteration in the status of the members of the company made between the commencement of the winding-up and the order for winding up shall, unless the Court otherwise order, be void." The commencement of the winding-up in this case was of course the presentation of the petition, and in regard to all the documents that have come into the hands of the solicitor after the presentation of the petition, to my mind that is a disposition within the meaning of this section of the property and effects, and ought to be taken in a large sense. I see no harm in attributing a wide meaning to that term, because the power of the Court to make orders sanctioning the transaction is sufficient to avoid any injustice being done. In the particular case before me, with reference to such of the documents, if there be any, as are in the solicitor's possession

other than the share register and the minute book of the company, they all came into his possession since the commencement of the winding-up and are therefore subject to this section. The handing over of the books with the view of creating a lien is a disposition.

The lien of a solicitor is like the lien of a wharfinger or banker, it forms part of any contract entered into between the solicitor and his clients. When the solicitor is retained it is not necessary that there should be any express stipulation for a lien. It is like an implied covenant in a lease, it forms part of a contract which need not be expressed, but which arises in point of law. Therefore the lien is a right to retain until a sum of money be paid, and which may vary from day to day as the amount for which the lien is claimed increases. I think that as regards the costs incurred after the commencement of the winding-up in this case, or in any case, it may be said that as the sum of money for which the lien arises increases day by day the lien must be said to operate as, and in fact to be a disposition, within the meaning of the section.

The solicitor who appeared for the company in this case has a right to be paid his costs of the company's defence to the petition, because when the order was made those costs were provided for, and it is now the settled law of this Court that the costs of obtaining a winding-up order, and all the costs directed to be paid upon the winding-up order, are the costs which are first payable out of the assets. My decision will not affect the solicitor's claim to have these costs paid out of the company's assets.

G. M.

On the 6th of June the official liquidator took out a summons for an order that Mr. *Beall* might be ordered to deliver up to him all applications for shares and allotment notes and all other documents relating to the allotment of shares in the company which were in his possession, and on the 26th of June an order was made in the same terms as in the former case, with leave to appeal direct from Chambers. These documents had been in *Beall's* possession from a time prior to the 18th of September, 1882.

C. A. 1883 — *In re* CAPITAL FIRE INSURANCE ASSOCIATION. — C. A.

Beall appealed from both orders, and the appeal was heard on the 4th of July, 1883.

Higgins, Q.C., and *Cordery*, for the appeal:—

As to the books generally, Mr. Justice *Chitty* relied on three cases. The first was *In re South Essex Estuary Company* (1). His Lordship overlooked the fact that in that case production was ordered only under the statutory jurisdiction conferred by sect. 115, which authorized production for the purpose of giving information to the Court. The present decision goes far beyond that, for it orders delivery. The next was *Belaney* v. *Ffrench* (2). The ground of the judgment was that solicitors engaged in an administration suit could not retain possession of documents of which they got possession in the suit so as to thwart the proceedings in the suit. This is no authority for saying that in a winding-up, which is governed entirely by statutory provisions, the same rule is to apply. The third was *Boughton* v. *Boughton* (3), but that related only to a solicitor who had been engaged in carrying on the proceedings which he sought to stop by means of his lien. A lien anterior to the suit is valid: *Warburton* v. *Edge* (4), *Baker* v. *Henderson* (5). In *Brassington* v. *Brassington* (6) production was only got at by *subpœna duces tecum*. It is difficult to see what bearing sects. 154, 155, and 156, which are referred to in the judgment, have upon the case.

As regards the minute book and the register of members, as to which the Judge thought there was a special reason for ordering delivery, they came into the hands of the solicitor for a legitimate purpose, and his lien must extend to them as much as to the other books and papers.

As regards documents delivered to the solicitor after the presentation of the petition, they were delivered after the petition had been dismissed by Mr. Justice *North*, and the parties reasonably proceeded on the footing that there would be no winding-up.

(1) Law Rep. 4 Ch. 215; S.C. before Malins, V.C., 20 L. T. (N.S.) 68.
(2) Law Rep. 8 Ch. 918.
(3) 23 Ch. D. 169.
(4) 9 Sim. 508.
(5) 4 Sim. 27.
(6) 1 S. & S. 455.

If the case comes within sect. 153 at all, which we submit it does not, for delivery of documents to a solicitor for the purposes of business is not a dealing with property, the Court will "otherwise order," and protect the transaction: *Gibbs & West's Case* (1); *In re Wiltshire Iron Company* (2). Where there has been a long interval between the presentation of the petition and the winding-up order all *bonâ fide* transactions ought to be protected unless there is a special reason to the contrary. If the company during the interval cannot employ a solicitor except on terms on which a solicitor does not usually undertake business, they would be paralysed.

As to the documents to which the second appeal relates, they were given to the solicitor for the purpose of his recovering calls, and there is no statutory provision to interfere with his lien.

[COTTON, L.J.:—We only call on the Respondents as to the documents comprised in the second order, and as to the question whether the order should not be limited, as in *Boughton* v. *Boughton* (3), to such of the papers as may from time to time be required for carrying on the proceedings.]

Ince, Q.C., and *Pinsent*, for the liquidator:—

As regards the documents only covered by the general words of the order, we do not object to that limitation. As to the documents in the second order, there is jurisdiction to order them to be delivered up under sect. 100.

[COTTON, L.J.:—They came to the hands of the solicitor before the presentation of the petition, and I see nothing to affect his lien.]

We rest our case on the three authorities relied on by Mr. Justice *Chitty*.

[COTTON, L.J.:—None of them seem to me to govern the case. A solicitor employed in a suit is in a very different position.]

If the Court in an administration suit will not allow a solicitor to insist on his lien so as to stop the proceedings, *à fortiori* it will not in a winding-up.

(1) Law Rep. 10 Eq. 312. (2) Law Rep. 3 Ch. 443.
(3) 23 Ch. D. 169.

C. A. 1883 *In re* CAPITAL FIRE INSURANCE ASSOCIATION.

COTTON, L.J. :—

This is an appeal against two orders made by Mr. Justice *Chitty*, which direct the delivery over to the official liquidator, subject to the Appellant's lien as solicitor, of three classes of documents. The second appeal is from an order applying only to certain documents relating to applications for and allotment of shares. The first order applies to the minute book and the register of shareholders, which came to the Appellant's hands before the commencement of the winding-up, and to various other documents belonging to the company which came to his hands after the commencement of the winding-up. The documents to which the second appeal relates came into the hands of the solicitor before the commencement of the winding-up, which was on the 18th of September.

I will deal first with the first appeal. The solicitor says, "I was employed by the directors to do legal business for the company, and these documents came into my hands for the purposes of that business, and so by common law I am entitled to a lien on them." Two of these documents, viz., the register of shareholders and the minute book, stand in a peculiar position. Can the Appellant establish any lien upon them so as to prevent the official liquidator from having them in his possession for the purposes of the winding-up? In my opinion he cannot. No doubt a solicitor gets his lien without any special contract, but still his lien arises from contract, and he can claim no greater lien than the person who puts the documents into his hands is capable of creating. It is true that the directors of the company have a general power of dealing with the property of the company, but, so far as no express power is given to them, they have only such powers of mortgage and sale as are reasonably incident to the business they carry on, they must not deal with any property of the company in a way inconsistent with the objects and constitution of the company, and this decides the case as to these two books. The register of shareholders is a book which, under the *Companies Act*, 1862, s. 32, is to be kept at the office of the company for the purposes there mentioned, and that being so, in my opinion the directors have no power to deal with it in such a way as to interfere with these purposes. It is true that when a

winding-up order has been made the purposes of a going company are at an end, but there arise on the making the order similar duties, which make it necessary that the register should be in the hands of the liquidator. As regards the book containing the minutes of meetings the case is not so clear, but, having regard to the articles and constitution of the company, I am of opinion that the directors have no authority to deal with that book so as to deprive themselves of the full power of using it for the purposes of the company. Therefore, as regards these two books, although they were handed over to the Appellant before the commencement of the winding-up, the order of Mr. Justice *Chitty*, in my opinion, was right. They must be handed over to the liquidator without prejudice to the Appellant's lien.

As regards the other documents which came into the hands of the solicitor after the commencement of the winding-up, I think the case is rather hard. Still a solicitor must know that where a winding-up petition has been presented, although it may be dismissed in the Court of first instance, the Court of Appeal may take a different view, and that if a winding-up order is made, then the liquidation will commence from the time of the presentation of the petition, and everything which is done subsequently to presenting the petition is to be taken as done pending the liquidation. What, then, is the question we have to decide? The question is not whether under sect. 115 we are to declare the lien to be void, but whether, if a solicitor receives documents pending the liquidation he can claim to retain them by virtue of his lien so as to interfere with the due prosecution of the liquidation and the due carrying out of the duties of the liquidator. In my opinion he cannot. He takes documents knowing that proceedings for winding-up are pending, and that a winding-up order, if made, will relate back, and he cannot claim any lien which will interfere with the prosecution of the liquidation. That, in my opinion, is the true meaning of *Belaney* v. *Ffrench* (1), which, as I think, is a decision affecting the present case. There a solicitor who acted for some of the parties in an administration suit claimed a lien on documents for costs incurred in the suit, and it was held that he could not by virtue of his lien refuse to

(1) Law Rep. 8 Ch. 918.

C. A. 1883

In re CAPITAL FIRE INSURANCE ASSOCIATION.

Cotton, L.J.

produce the documents, and so prevent the suit being prosecuted, there being other persons interested besides the particular persons who put the papers into his hands. When he took the documents he knew that he took them for the purposes of the suit and that other persons were interested, and he could not by means of his lien interfere with its prosecution. What is said in *Boughton* v. *Boughton* (1) appears to be wider, but the case is in reality the same. Therefore, in my opinion, as regards those documents which were put into the possession of the Appellant after the commencement of the winding-up, the lien is subject to the right of the liquidator to have those documents in his possession for the purposes of the liquidation. Mr. Justice *Chitty* has made the order in both cases subject to such lien (if any) as the solicitor is entitled to. I assume, for the purposes of the case, that he has a lien, but I say that his lien as regards these papers is subject to such right of the liquidator as I have mentioned.

There remains the case of the letters of application and other papers relating to allotment of shares. They were placed in the hands of the Appellant before the commencement of the winding-up. They are documents as to which there is no special provision in the Act or in the articles of association, and they stand in a different position. They were documents which came to his hands before the commencement of the winding-up, and his lien, which was good before the winding-up commenced, is not interfered with by the winding-up order. *Boughton* v. *Boughton* does not apply to such a case. The documents there came into the possession of the solicitor pending the proceedings. Here a good lien was acquired before the liquidation, and therefore the remarks which I have made as to those documents which came into his possession after its commencement do not apply. It may be said that this will place the liquidator and the company in a position of great difficulty. The answer is that if persons do not pay their solicitors they may get into difficulty. Moreover, sect. 115 enables a company and liquidator to get such production as is necessary for the purposes of the liquidation, so that they are not absolutely without remedy. The second order appealed from must therefore be discharged, and the first order will be

(1) 23 Ch. D. 169.

modified in the way proposed. The Appellant must pay the costs of the first appeal, and the liquidator the costs of the second.

Bowen, L.J. :—

I agree, and have nothing to add.

Solicitors for Appellant: *Beall & Co.*
Solicitors for liquidator: *Field, Roscoe, & Co.*

H. C. J.

In re BLACKBURN AND DISTRICT BENEFIT BUILDING SOCIETY.

Building Society—Withdrawal of Members—Notice of Withdrawal—Power to claim Payment "provided the funds permit"—Applicability of Rules to a Winding-up.

One of the rules of a building society gave power to the investing members to withdraw their money, provided the funds permitted, on giving notice according to a prescribed form printed in the schedule. The society was ordered to be wound up, and the assets were insufficient to pay the investing members in full. Several of the investing members had given notice to withdraw all their money, and their notices had expired before the commencement of the winding-up, but they had not been paid. Some of them had not used the printed form of notice prescribed by the rules, but their notices had been accepted by the directors :—

Held, that the rule as to the withdrawal of members must not be confined to the society as a going concern, but was applicable to adjust the rights of the withdrawing and continuing members *inter se* in the winding-up; that the members who had given notice to withdraw either in the prescribed form or otherwise, and whose notices had expired before the commencement of the winding-up, were entitled to be paid out of the assets next to the outside creditors, and in priority to the other investing members who had not given notice of withdrawal, notwithstanding that at the date of the winding-up there were no funds in hand for their payment.

Whether the members who had given notice of withdrawal but had not been paid before the commencement of the winding-up remained members of the society, *quære*.

THE *Blackburn and District Benefit Building Society* was established in 1868 in accordance with the statutes regulating building societies.

The object of the society was stated in the rules to be "To assist its members to erect or purchase freehold or leasehold

C. A. 1883

In re Blackburn and District Benefit Building Society.

property or to enable them to invest their contributions upon interest. Payments of any amount will constitute a member."

The value of each share was £10.

There were two classes of members, as usual in such societies, those who received advances on their shares, and those who invested.

The following rules were specially referred to in the arguments:—

"Rule 2. All subscriptions when they amount to £1 upon investment accounts shall bear interest at the rate of 5 per cent. when they amount to £5 they shall bear interest at 6 per cent. (provided the funds permit), to be added at the annual audit, but such interest or dividend shall not be paid until the shares are realized or withdrawn. The directors shall have power to alter the rate of interest to be divided. Any surplus profits which may arise shall be carried to a reserve fund to meet future contingencies, and if not required for that purpose a portion thereof may from time to time be divided amongst the members in such manner as the consulting actuary shall determine."

"Rule 3. Any member of this society shall be allowed to withdraw (provided the funds permit) sums not exceeding £10 by giving seven days' notice, and sums exceeding £10 by giving one month's notice according to the printed form in the schedule annexed. No further liabilities shall be incurred by the society till such member has been repaid."

A form of notice for withdrawal was appended to the rules as follows:—

"I hereby give you notice that I desire to withdraw £—— (on my shares numbered ——) from the society as soon as the funds will allow.

"Name ————————

"Address ————————

"No. on register ——"

On the 23rd of July, 1881, a petition was presented for winding-up the society in the Chancery Court of the County Palatine of *Lancaster*, and on the 25th of October, 1881, a winding-up order was made.

Difficulties occurred as to the priority of the creditors and investing members of the society, and a statement of facts was agreed on in which the following facts were stated:—

There were three classes of persons who either were or claimed to be creditors of the society:—

1. Outside creditors, that is to say, creditors of the society for work done or goods supplied to the society. The claims of these persons amounted to £2212 or thereabouts.

2. Investing members who gave notice of the withdrawal of the whole or part of their investments. This class, as admitted by the official liquidator, numbered about 514 persons, and the claims amounted to £45,122, or thereabouts.

3. Investing members who had not given notice of such withdrawal. This class, as admitted by the official liquidator, numbered about 1926 persons, and their claims amounted to £125,077, or thereabouts.

With regard to the persons comprised in the second class, a large number of the notices sent in by them were informal by reason of their not having been given in conformity with rule 3.

Representative cases were selected to represent these various classes, and the following questions were submitted to the Vice-Chancellor of the Duchy of *Lancaster*:—

A. Are the members of class 3, namely, investing members, who had not given notice of withdrawal, rightly excluded from the list of creditors of the society?

B. In case the assets of the society were sufficient to pay the members of class 1 in full, but insufficient to pay the members of class 2 in full, are the members of class 3 to be settled on a list of contributories to provide a fund to pay class 2 in full, and is there any priority as between the members of classes 1 and 2?

C. Are the investing members of the society who have given notice of withdrawal within the time limited by rule 3, and before the date of the presentation of the petition, in the form given in the schedule to the rules, to be treated as having ceased to be members, and are they to be ranked and paid as creditors of the society?

D. Are the investing members who have given notice of withdrawal within the time limited in rule 3, and before the date of

C. A. 1883

In re BLACKBURN AND DISTRICT BENEFIT BUILDING SOCIETY.

the presentation, but on informal notices, to be treated as having ceased to be members, and are they to be ranked and paid as creditors of the society?

E. If so, did such membership cease at the date of such notice or at the due expiration thereof?

With regard to the informal notices, it appeared that the society had not been in the habit of using the printed form of withdrawal set out in the schedule to the rules, but generally used the following printed form of withdrawal:—

"I hereby give you notice that I desire to withdraw the sum of £—— from my account with the society No.—— as soon as the funds will allow.

"Name ————————

"Address ————————"

It also appeared that the officers of the society were in the habit of acting upon any written, or even verbal, notice of withdrawal, provided the intention of the person giving such notice was clear.

On the 8th of December, 1882, the Vice-Chancellor, Mr. *H. F. Bristowe*, Q.C., gave judgment on the points submitted to him. He held, in answer to question A, that the investing members who had not given notice of their intention to withdraw were rightly excluded from the list of creditors.

As to question B, his Honour did not consider it necessary to answer it at that time.

As to questions C and D, he held that those members who had given due notice of withdrawal, whether formally or informally, had ceased to be members, and were to rank and be paid as creditors of the society next to the outside creditors.

Question E was not answered.

From this decision the investing members who had given no notice of withdrawal appealed.

Ince, Q.C., and *H. B. Buckley*, for the Appellants:—

The rules of the society were applicable only while it was a going concern, and do not govern the rights of the parties in the winding-up. The withdrawal was only to be effective "provided the funds permitted." If there were no funds at the time

available to pay the withdrawing member, the withdrawal did not take place till there were funds. The expression "provided the funds permit" refers to money in hand, not to the money which was outstanding on mortgage, or which may be called up by the liquidator in the winding-up. These points were decided by the late Master of the Rolls in the case of a society similarly constituted: *In re Mutual Society* (1). In the present case this is made clearer

(1) M.R. Dec. 9, 1880.

In re MUTUAL SOCIETY.

THE Mutual Society was registered as an unlimited joint stock company under the *Companies Act*, 1862.

Its objects were—To accumulate capital sums by means of monthly subscriptions from the members.

To advance such capital sums to such members as should be desirous of receiving the same in rotation upon security.

To repay to every member the amount of his subscriptions, and ultimately to divide the entire profits among such members as should have continued their subscriptions to the time of the division.

Each member received a certificate of membership, which was called a bonus certificate, which entitled him to participation in the profits of the company, or an appropriation certificate, which entitled him also to receive an advance of £100.

Each member paid a monthly subscription to the society. The subscriptions paid in by the members on certificates issued in each year were kept separate from those paid in on certificates issued in any other year, and formed separate funds. When the capital accumulated in any separate fund was sufficient, appropriations or advances of £100 were made to the members holding appropriation certificates, who gave security and paid the advances back by instalments. Some of these appropriations were made by lot, in which case the members receiving them paid no interest or premium for them, and in other cases they were made to members who offered the highest premium for them.

When appropriations had been made by all members entitled to them, the fund was closed and the accumulations divided among the members then living.

By rule 3*a* of the articles of association it was provided that every person should cease to be a member in respect of any certificate immediately such certificate should be forfeited, or upon his receiving from the society a return of the subscriptions paid by him in respect of such certificate in accordance with the regulations thereinafter provided.

Rule 61 was as follows:—

Any member who, after the expiration of three calendar months from his entry, may wish to withdraw from the Society, and the legal representatives of any member who shall have died, shall be entitled to have the total amount of the subscriptions which shall have been paid upon each certificate held by such withdrawing or deceased member returned to him or them, a withdrawal fee of ten shillings per certificate being first deducted in the case of appropriation certificates, and of five shillings in the case of bonus certificates; provided, nevertheless, that such payments shall be made solely out of moneys existing at the

C. A. 1883

In re BLACKBURN AND DISTRICT BENEFIT BUILDING SOCIETY.

by rule 2, respecting the rate of interest to be allowed, where the same proviso about the funds permitting is inserted. The object

time in any fund, and composed exclusively of sums which shall have been paid as premiums upon or received in respect of repayment of appropriations, and provided that in all cases payment be only made in rotation according to the date of receipt of the notice from such withdrawing members or the representatives of such deceased members.

Rule 80*d* provided that no member should be entitled to vote in respect of any certificate placed on the withdrawal register.

An order having been made for the winding-up of the company, a summons was taken out before the Master of the Rolls, asking among other things that it might be declared that as between the members of the society no member was entitled to priority of repayment of his subscriptions on his certificates by reason of his having given notice of withdrawal.

The summons was adjourned into Court.

Chitty, Q.C., *H. B. Buckley*, and *Moulton*, for the official liquidator.

Davey, Q.C., and *Whitehorne*, for the members who had withdrawn.

Ince, Q.C., and *Romer*, for the advanced members.

Roxburgh, Q.C., and *Maddison*, for other members.

JESSEL, M.R., after deciding another point raised by the summons, said:—

As regards the other point I must say that to my mind the point is clear. The rules in question contemplate the society as a going concern, and they give directions as to how people are to be paid. Now what is the theory of the society? The theory of the society is that it lends out its money, and it only gets money back by a return of what they call the appropriation—that is, the loans and premiums, as they call it, which have been paid or which are liable to be paid by the borrowers—that is out of sums payable by the borrowers. Consequently when a man withdraws from the society he is to have repaid him what he has paid. The theory of the society is that it has or may have no money to pay them. Now when we look at the rule to see how he is to be paid we see at once that this is not intended to say that as between one withdrawing member and another there is any priority—that is priority of charge on the outstanding debts. That is not contemplated at all. The man who is to withdraw is to get his money. He is not to get his money from the society, or the members of it personally, but he is to get it out of the fund. What fund? Why the available fund—that is the available money fund. He is only to get it out of moneys existing at the time. That means cash, and at the time of payment there is no money, because this man is unpaid and we have come to a winding-up. All the money of the society is lent out to people. It does not apply to him. Then the rule says "and composed exclusively of sums which shall have been paid as premiums upon or received in respect of repayment of appropriations, and provided that in all cases payment be only made in rotation according to the date of receipt of the notice from such withdrawing members." Then there is a proviso with regard to

of rule 3 was not to enable members to withdraw from the society, but to enable them to reduce their interest in the society, either by withdrawing a certain sum on such share, or by withdrawing the whole money on some of their shares. Now that the company is being wound up, all the members who have not actually

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members giving notice and wishing to appropriate. Now the words are, "only made in rotation according to the date of receipt." It means this, that as the cash comes in it is to be paid out to the members in rotation. Although it is "existing at the time," it must be read "at the time of payment," or at a subsequent time. The man is not to lose his money because there is no time. If you read it literally, "existing at the time" means existing at the time of payment, and this if fairly construed means this, that it shall be in the shape of money coming from the payment of contributions, and then that is to be paid in rotation, but the notion of priority of charge as distinguished from priority of payment does not appear upon the rule at all. The rule is framed under the idea that the society is a going and a solvent concern, and that everybody is to be paid in rotation. The rule is that they shall be all paid in rotation, not that one shall be paid and the other left unpaid, and it has no application in my opinion to the case of a winding-up. It is only a direction as to the particular mode of applying the funds as they come in so as to pay everybody in rotation. When you come to winding-up you have no mode of realizing the fund *modo et forma*. You may sell the securities if you like and get money in that way, and probably that would be the proper and will be the only way as regards a very large majority. When you have got the money what are you to do with it? You cannot pay them all in rotation, because there is not enough. It appears to me it follows as a matter of course that they are creditors, all creditors alike, though their debts matured, so to say, at different dates, and that the rule must be to apply the money in hand belonging to that fund rateably amongst those creditors.

Davey, Q.C.:—I understand your Lordship also to have decided that the withdrawing members as a class who have given notice of withdrawal before the winding-up, but have not been paid, have no priority over members who did not give notice of withdrawal.

JESSEL, M.R.:—

I have decided that most conclusively. They are in exactly the same position as policyholders in an insurance office—that when there is a winding-up the man whose policy becomes a claim proves for the full amount, and the man whose policy has not become a claim proves for the value of the policy. Now we have got a winding-up. The claimants upon the fund afterwards withdraw from it the amount due to them and the other people have the value of them it may be.

Davey, Q.C.:—It is the same thing really. He draws a dividend, if I may call it so, upon his shares.

JESSEL, M.R.:—

We are now dividing the fund amongst co-adventurers or *quasi* partners.

C. A. 1883 *In re* BLACKBURN AND DISTRICT BENEFIT BUILDING SOCIETY.

received back all their money must be treated as partners, and be equally liable to the creditors: *In re Queen's Benefit Building Society* (1); *In re Norwich and Norfolk Building Society* (2); *In re Doncaster Permanent Building Society* (3). At all events, those members ought to be held liable who have only given an informal notice to withdraw.

Davey, Q.C., and *Foard*, for members who had given a formal notice.

Rigby, Q.C., and *Rotch*, for members who had given an informal notice.

Snow, for the official liquidator.

The counsel for the Respondents were not called on.

BRETT, M.R.:—

In this case a building society was wound up, and at the moment when the winding-up commenced it had property which could be realized—I mean existing property as distinguished from property that might be received by calls. At the moment of winding-up there were three classes of persons who might be interested in that existing property—one consisted of what are called outside creditors; another consisted of members who were entitled to give, and who had given under the rule of the society, notice to withdraw—that is to withdraw certain moneys which they had subscribed to the society—and the third consisted of members of this society who had subscribed money to the society but had not given notice of withdrawal. The property of the society which can be realized is more than sufficient to pay the outside creditors, and the question in this case is what is the mode in which that property which is in existence and which is to be realized, or which has been realized, is to be divided between the other two classes, if it is to be divided at all.

That depends principally upon the construction of the rules; after you have construed the rules, then, no doubt, there arises a

(1) Law Rep. 6 Ch. 815. (2) 45 L. J. (Ch.) 785.
(3) Law Rep. 3 Eq. 158.

question of what is the principle of law to be applied. It was urged by Mr. *Ince*, that whatever would be the construction of the rule the moment before the winding-up, the rules are only made for what he calls the carrying on of a going concern, and that inasmuch as the winding-up puts an end to the society as a going concern, nothing in the rules is applicable or is to be applied after the winding-up. That seems to me to be a prodigious construction, and one which if it were true would call upon the Court, whenever such a case as this is brought before it, to throw the rules under the table, which nobody has ever suggested, although the words have been sometimes used by some of the Judges that the rules are intended for a going concern. No doubt they are, but it does not follow because the rules were made for a going concern, that therefore when the concern is stopped the rules are to be thrown into the fire. The consequence does not follow from the premises.

Then Mr. *Ince* contended that if you throw the rules with regard to the withdrawals and the mode of division into the fire, then the persons who have subscribed to this society are partners without any rules, and that if they were partners without any rules, the principle of law would be that they come in equally with regard to the assets which can be realized.

That proposition depends on the first, namely, that you may disregard the rules. It seems to me that you might as well say, that if there were partnership articles and there was an end put to the partnership, the articles were made for the partnership as a going concern, and the moment you have to settle the rights of the parties at the end of the partnership the articles of partnership are no more applicable. One proposition depends on the other, and neither can be supported.

It seems to me that the principle is this. In considering how such property as this is to be treated with regard to those people who have been joint members—I decline to say they were partners—the question must be, first, whether those who have given the notice to withdraw are to be treated as creditors; secondly, supposing they are not, what is the arrangement or contract between the two classes assuming them to be all members. What is the contract as regards their rights with

C. A. 1883 *In re* BLACKBURN AND DISTRICT BENEFIT BUILDING SOCIETY. Brett, M.R.

reference to the property existing, although it has not been realized? What are the rights under the agreement with each other? The moment you come to that, it must be determined as if you were considering the matter the moment before the winding-up, and then those rights are to be applied to the division of the property and the mode in which that property is to be treated in the winding-up.

Now it was suggested on the one side that those persons who had given notice to withdraw are creditors, or are to be treated as if they were creditors, and for that the expressions used by the learned Judges in the case of *In re Queen's Benefit Building Society* (1), and the *Norwich and Norfolk Building Society* (2), were relied on. I do not think it necessary to decide in the present case whether these people are to be treated as if they were creditors, or to determine whether they are creditors. That they are creditors of the same kind as what have been called the outside creditors I do not suppose; that they are to be treated as creditors it is not necessary to determine, but I should be very much inclined to think that the real meaning of those Judges was, that as between them and the other class they were to be treated as creditors. Now, it has been strongly urged that they did not cease to be members. If they did cease to be members on giving notice of withdrawal they must be in the nature of creditors, whether it could be said that they were the same as outside creditors or not. I do not think it is necessary to determine that they are not members. I will assume, for the purpose of my decision, that they remain members as between themselves and those people who have not given notice. Then I say that the question is what are their rights with regard to each other by mutual agreement between themselves, and are they to be construed as if we were construing the rules the moment before the winding-up? Upon that it has been said that the mutual agreement is, that those who have given notice to withdraw shall be paid only out of a particular fund, and that the existence of that particular fund is a condition precedent to their right to be paid; and it is said that the fund did not exist the moment before the winding-up, and therefore that there was no agreement that they should be paid in any other way than the people who had not given notice. If the true

(1) Law Rep. 6 Ch. 815. (2) 45 L. J. (Ch.) 785.

construction of the rules had been that they were only entitled to be paid out of a particular fund, and if that fund did not exist at the time of the winding-up, then I am inclined to think that the condition not having been fulfilled, they could not have had any priority over the others in the winding-up. Then I should have thought that the principle applied by the late Master of the Rolls in the *Mutual Society's Case* (1) would have been applicable in this case. But the question is, whether the construction of the rules in this present case is the same as the construction which he put upon the rules in that case. With regard to that point, of course that case cannot help us at all. The construction of one set of rules cannot help us in the construction of another set of rules. We are therefore driven to consider the construction of the rules in the present case.

It has been very strongly argued that there are words in the 3rd rule which make the right of the withdrawing members to payment a right to payment only out of a particular fund, and that it therefore makes the existence of that fund a condition precedent to their right of payment. That depends on the question whether the words "provided the funds permit" mean funds immediately ready to be handed over—in other words, whether they mean funds at the bankers, or whether they only mean provided the property of the company is such as upon realization permits payment. The same words "provided the funds permit" occurs in the 2nd rule also, and it was argued that as the same words are used in the two rules they must have the same meaning in both, and then it was argued that in the 2nd rule they did mean a fund immediately applicable to payment. But the argument is fallacious: for it is perfectly clear that in the 2nd rule the terms used do not mean a fund immediately applicable for payment. [His Lordship read the 2nd rule.] It is obvious to my mind from that rule that the interest is to be calculated and carried to credit before the time when the money is payable, or is in a fit state to be handed over; and if that be so the words "provided the funds permit" cannot refer only to funds at the bankers. They must mean "provided the state of the company's property is such as to permit of the declaration of a dividend of

(1) *Ante*, p. 425, n.

C. A. 1883 — *In re* BLACKBURN AND DISTRICT BENEFIT BUILDING SOCIETY. — Brett, M.R.

6 per cent." If that be the meaning of the words in the 2nd rule then the argument that the 3rd rule is to be construed according to the 2nd is fatal to the Appellants' proposition. But whether it is so or not it seems to me that it is impossible to say that "provided the funds permit" shall be construed so strictly as to say that it means only funds at the bankers. If it does not, then the money in this case is not money that is to be paid out of a particular fund upon condition that it is not payable at all unless that fund exists—namely, the fund at the bankers; it is therefore to be paid off by any moneys which can be raised out of the property of the company. It seems to me that there is no meaning at all, and no effect at all, given to this 3rd rule as between the members who give notice to withdraw and members who do not, unless the meaning is that as between them it is an arrangement that those who have given notice to withdraw shall be paid, if the property of the company will permit, out of the property of the company before the others. As between them it is an agreement that the one class shall be paid in priority to the others—that is the whole meaning of it, and it has no meaning unless it has that.

If I had to construe these rules at the moment before the winding-up begun, I should say that there was an arrangement between those members who had given notice to withdraw and those members who had not given notice, that the property of the company should be so divided that those who had given notice to withdraw should be paid before those who had not given notice. If that were so the moment before the winding-up it seems to me that the moment after the winding-up this agreed rule between those two sets of people is to be carried out under the winding-up, if under the winding-up there is any property that is to be divided between them.

For these reasons I am of opinion that the decision of the Vice-Chancellor was right, and that there is nothing in the decisions cited of the late Master of the Rolls which is in conflict with that decision.

COTTON, L.J.:—

In this case it is conceded that there are funds enough to pay all those creditors who never were members of the company, and

the only question we have to consider is between those existing members who have given notice of withdrawal and those who have not given notice, the question being how are they to be paid out of the funds remaining after paying the creditors called the outside creditors, though that is not a very happy name.

Now as the creditors have been got rid of and the question is simply one of contract between the parties, we must ask what contract did the members come to between themselves when the company was formed. That really turns on rule 3, which provides that members of the society shall be allowed to withdraw, and then they are to be repaid, and until they are repaid no further liabilities are to be incurred. It is said that because the society is now being wound up this rule does not give them any priority as regards the other members who at the moment before they gave their notices were in the same position. Before the society was wound up undoubtedly they had a right which those who had not given notice had not to receive repayment of their money. I will deal with the question as to the words "if the funds permit" presently. To that extent also they not only have priority but they have a right; and what the Appellants desire is in the winding-up to put these members in the same position as if they had never acquired any such right. It was argued generally in this way, that the rule gave them a right to be paid when the concern was a going concern, which all members of course have whether they had given notice or not when the concern is wound up; because then there must be a division of all the assets among all the members; and therefore in the winding-up they are in just the same position as if no such notice had been given. To my mind there is a fallacy in this argument. What is a partner, or I will say a member, as such, entitled to, when there is no contract regulating what his rights in the winding-up are? He is entitled (not upon the contract, because I assume that there is no provision on that subject) when all the liabilities, including contracts which he has made with his co-partners have been satisfied, to receive in consequence of his position of member an equal share of the remaining assets. He has no contract with his co-partners that he shall have that, but the law gives it to him in consequence of his being a partner, and gives it only when all

C. A. 1883

In re BLACKBURN AND DISTRICT BENEFIT BUILDING SOCIETY.

Cotton, L.J.

the contracts which he has entered into, including those with his co-partners or fellow members, have been satisfied. And therefore from that proposition, independently of the construction of the rules which I shall presently mention, it necessarily follows that where the winding-up takes place it puts the members in exactly the same position as partners who have contracted in the same way as these members have done, and as to whom there is no contract as to their rights on a dissolution, but who merely get what they are entitled to, as the necessary incident of law, from their position of partners who have already paid all that which by the contract they have bound themselves to pay.

But then it was said that on the construction of the 3rd rule, it is one which applies only to a going concern, it does not apply to a winding-up. That depends on these words, "Provided the funds permit." Let us see whether that can be the meaning of it.

First of all I refer to the end of rule 3: "No further liability shall be incurred by the company till such member shall be repaid." It was said, ingeniously, by Mr. *Buckley* that this applied to their not making any further advances to members who wished to be advanced. The contract to pay them is one liability, but the society might incur other liabilities, and the rules, as I understand, fully recognised the fact that there might not be at the immediate moment when the notice to withdraw was given, any cash in hand immediately available, because they provide that until those who have withdrawn have been repaid what they are entitled to in consequence of their notice to withdraw, no liability shall be incurred which shall have precedence over their claims. We must also look at the words "provided the funds permit." I will not again refer to the 2nd rule, which I think negatives, by the use of the words "where no payment has been made," the argument that it means "provided there are funds in hand at the bankers—cash to meet and provide for it at the right moment." But it has to my mind this other obvious meaning, "Provided there are assets of the company available for the purpose without making any call on the members," and it is to obviate that, in my opinion, that this clause was inserted, namely, that they are to give notice to get their money if the assets are sufficient to make the company solvent and to repay

those sums, but they are not to make any calls on the individual members.

That being so, this in my opinion is not a claim which only applies to the company as a going concern. The solvency of the funds will be ascertained by the winding-up; and therefore it cannot be said where the funds are sufficient, as they were in this case, to pay the withdrawing members, that this is a condition which cannot be provided for in this society in consequence of the winding-up.

It was suggested in argument that all these clauses must generally only apply to a going concern. I do not on a question of construction wish to refer to other cases, but *In re Doncaster Permanent Building Society* (1) is against that contention. It is true that the provisions in the clause are very different; but there, although they pointed to a going concern rather more than the rules in the present case do, the Court regulated the right of the parties in the winding-up according to the construction which it put upon the rules.

There was another authority much relied on by the Appellants, namely, the case before the late Master of the Rolls: *In re Mutual Society* (2). In my opinion that cannot help us in this case, nor does it lay down any general rule, because there was there an express provision that the sums which the withdrawing members desired to have should be paid solely out of money belonging at the time of the notice of withdrawal to certain funds composed exclusively of sums which had been paid as premiums upon or received in respect of the payment of appropriations. Of course these could not exist after the winding-up, and although it was provided that payment in all cases should be only made in rotation, I cannot see how that assists in making that case available here, because if payment in rotation were to be made out of a fund which did not exist at the time the notice was given and which could not be brought into existence after the winding-up, that shews conclusively that the rule could not have had an application, and could not be made available in the winding-up. Here there is a contract between the parties as to repayment to those who gave the notice, not in any way limited

(1) Law Rep. 3 Eq. 158. (2) *Ante*, p. 425, n.

C. A. 1883

In re BLACKBURN AND DISTRICT BENEFIT BUILDING SOCIETY.

Cotton, L.J.

or put an end to by there being a winding-up, and therefore the priority must prevail as the Vice-Chancellor has ruled.

It is unnecessary to say whether these persons are creditors or not. If it were necessary to decide it I should say that they were creditors; but of course creditors who cannot when the society of which they were members is insolvent compete with those creditors who are not members. It is unnecessary to decide that; the simple question is what is the real contract between the members? In my opinion this appeal fails.

BOWEN, L.J.:—

I am of the same opinion. I think this is the purest question of construction that ever came before the Court. There certainly is no question between the Appellants and any outside creditors. The funds permit of paying outside creditors, and all we have got to determine under a rule which provides that persons who are members of a society may give a particular notice of withdrawing a particular sum and a particular interest from the common funds of the society, is what is the effect of the rule upon the members who give the notice. The persons whose respective rights we have to consider are persons who have been members of that society, and who, at a given moment, have given their notice. In what position does that place them as regards the members of the society who have not given the notice? It is a pure question of the construction of the rule. It is quite as much a question of construction as if we were construing partnership articles. The distinguished counsel who argued this case before us have, I think, drawn three red herrings across the path of the Court, in the hope that we should be drawn off the scent. First, they discussed the question whether the effect of giving this notice was to make the persons who gave it no longer partners, or whether they still continued partners. Then they discussed the question whether those persons who gave the notice were creditors, and, lastly, whether they remained members after giving that notice. That is to say, they began by inviting us to consider to what class or category, whether creditors, partners, or members, these particular persons belonged, before they allowed us to decide what the exact effect of the rule was, and what was the exact

right which it gave. The rights of a creditor depend upon the contract made between himself and the persons whose creditor he is. The rights of a partner depend upon the contract which he has made with the persons who are, or were at one time, his partners. The rights of a member of a society depend also on contract. "Member" is not a term of art, and it may mean different things according as you apply the term. But in every case it is a question of contract. I think the Court rightly declined to be led into a discussion as to which category the right belongs to until we know what it is.

Then we come to the construction of rule 3, on which it all turns. There again the distinguished counsel who argued the case began by inviting us to look at four or five other cases. Four or five other cases decided upon different rules might be extremely useful if the principle of construction were not clear. But where is the ambiguity about any principle of construction to be applied to the case? When you construe an article of a mutual benefit society it does not require an oracle to tell you that you must construe it with reference to the subject-matter, that is to say, with reference to a mutual benefit society, any more than it requires an oracle to tell you that when you are construing an article of partnership you must be sure to bear in mind that you are dealing with the rights of partners. Both Mr. *Ince* and Mr. *Buckley* asked us to look at a particular case decided by the late Master of the Rolls, for the purpose of shewing that when you are dealing with articles which relate to giving notice of withdrawal in building societies, you are to read those articles as if they were to be applied only to a going concern. I feel sure that no such preposterous proposition ever entered into so lucid a mind as that of the late Master of the Rolls. It puzzled me very much, I confess, when I heard his judgment cited for that purpose. The late Master of the Rolls said, as every man of sense would say, that the rules are made for a going concern, and on the assumption that the concern is still going. It does not follow that none of the rules can possibly contemplate the cessation of the concern. That cannot be the general rule of construction. That principle cannot be found in the cases cited. All that the case cited decided was that when there was a special fund pointed out for the payment of withdrawing members—a fund that did

C. A. 1883 *In re* BLACKBURN AND DISTRICT BENEFIT BUILDING SOCIETY. Bowen, L.J.

not and could not exist after the winding-up—the members who were only to be paid out of that fund could not be paid when the fund did not exist. That is to say, the case decided that the clause which in those particular articles was applied to one thing was not to be treated as applied to another. That is the only principle of construction that I can see in that case.

I have very little to add to what has been said about the construction of this particular rule. If the counsel for the Appellants could make out that the words "provided the funds permit" were to be construed in this rule as, "provided the society, as a going concern, has at the moment money in its hands for repayment which has not been re-invested," then of course it could not apply to the general funds or assets of the company after the winding-up. But is there any reason for so deciding? Putting rule 3 side by side with rule 2, if we are to take the words as meaning the same in both rules, it certainly does not mean that. At all events it does seem to me that whatever those words may mean, rule 3 can only have a sensible effect if you construe it as giving a member an indefeasible right on serving his notice of withdrawal, to be paid his money if the funds permit, and as soon as the funds permit. What case may or may not fall within the words "provided the funds permit" it is not necessary, I think, to decide at the present time. Here the funds, *ex concessis*, do permit after the winding-up, and even if they did not permit before, I think those words apply. It seems to me that the rule cannot have any sense at all unless it not only gives the members of the society an indefeasible right to be paid upon serving their notice of withdrawal, but a right to be paid according to the dates of the notices, and in priority over all the other members who have given no notice. I do not mean a right to be paid in rotation or in priority *inter se*, but to be paid according to the dates of their notices as against the persons who have given no notice at all.

Solicitors for Appellants: *Bolton, Robbins, Busk, & Co.*, agents for *Radcliffe, Blackburn.*

Solicitors for Respondents: *Chester, Mayhew, & Co.*, agents for *H. M. Richardson, Bolton*; *Robinson, Sons, & Gill, Blackburn*; *Danger, Liverpool.*

M. W.

PHILLIPS *v.* HOMFRAY.

C. A.
1883
PEARSON, J.
Feb. 15, 17, 20 24.
C. A.
May 22, 30; *July* 9.

[1866 P. 157.]

Actio personalis moritur cum personâ—Trespass—Benefit received by Trespasser.

By the decree in 1870 it was declared that *H. & F.* and the estate of their deceased partner were liable to the Plaintiffs for minerals taken by them under the Plaintiffs' farm, and that *H. & F.* were liable to compensate the Plaintiffs for user of all roads and passages under the farm, and inquiries were directed—1. As to the quantity of minerals taken and their value. 2. What quantities of minerals had been carried by the Defendants through the roads or passages under the farm. 3. What upon the result of the second inquiry ought to be paid by the Defendants as wayleave for the user of the roads and passages. 4. Whether the farm, and the mineral property of the Plaintiffs under it, had sustained any and what damage by reason of the way in which the Defendants had worked under the farm. Pending these inquiries *F.* died, and his executrix moved to stay proceedings under the second, third, and fourth inquiries:—

Held, by *Pearson*, J., that the fourth inquiry must be stayed, but that as the estate of *F.* had derived profit from the trespasses to which the second and third inquiries related, it was liable after his death, and that those inquiries must be prosecuted:

Held, on appeal, by *Cotton* and *Bowen*, L.JJ., *dissentiente Baggallay*, L.J., that proceedings under the second and third inquiries must also be stayed, for that, apart from cases of breach of contract, a remedy for a wrongful act done by a deceased person cannot be pursued against his estate, unless property or the proceeds or value of property belonging to another person have been appropriated by the deceased person and added to his estate.

THIS suit was instituted in the year 1866 by the Plaintiffs against *S. Homfray* and other persons, including the deceased *R. Fothergill*, praying for a declaration that the Defendants were liable in respect of certain coal and ironstone gotten and removed by them from under the Plaintiffs' farm, for an account of the coal and ironstone gotten by them from under the farm, for an account of coal and ironstone conveyed from the Defendants' own mines through roads and passages under the Plaintiffs' farm, and that the Defendants might be decreed to pay for the coal and ironstone wrongly gotten by them from under the Plaintiffs' farm at their proper value, and also to pay a wayleave rent or compensation in respect of their user of the roads and passages under the Plaintiffs' farm for the conveyance of their own coal and

C. A. 1883 PHILLIPS v. HOMFRAY.

ironstone; also that they might pay compensation for the damage done to the surface of the Plaintiffs' farm, and for other relief. The facts of the case are substantially set forth in Law Rep. 6 Ch. 770. On the 28th of August, 1869, *W. H. Forman*, one of the Defendants, died, and the suit was revived against his executors. The cause came on for hearing before Vice-Chancellor *Stuart*, together with the cross-suit of *Fothergill* v. *Collins*, in which the Defendants in the first-named suit prayed against the Plaintiffs in the first-named suit specific performance of an agreement for sale of the Plaintiffs' farm. On the 9th of May, 1870, a decree was made in both suits by the Vice-Chancellor which was appealed from. The appeal came on for hearing before Lord *Hatherley*, L.C., who on the 30th of June, 1871, made an order varying the decree of the Vice-Chancellor.

By the Vice-Chancellor's decree, as varied on appeal, it was, amongst other things, declared that the Defendants *Fothergill* and *S. Homfray* in the first suit, and the estate of the deceased Defendant *W. H. Forman* in the first suit, were answerable to the Plaintiffs in the first suit for and in respect of all coal, ironstone, and other produce at any time gotten or removed by them, or by their order, or for their use, under the Plaintiffs' farm, or any part thereof, and that the Defendants *S. Homfray* and *R. Fothergill* were liable to make compensation to the Plaintiffs in the first suit for user of all roads and passages under the said farm, and the following inquiries were directed:—1. An inquiry what quantities of coal, ironstone, and other produce have been so gotten or removed as aforesaid. And it was ordered that the market price or value, or as near thereto as may be, of all coal, ironstone, and other produce so gotten or removed as aforesaid at the pit's mouth (all just allowances being made to the Defendants in the first suit in respect of their charges and expenses (if any) on account of the carriage to the pit's mouth or otherwise of such coal, ironstone, and other produce, but no allowance being made for the expense of getting, severing or working the same) be certified. And it was ordered that the following further inquiries be made:—2. An inquiry what quantities of coal, ironstone, and other produce have been conveyed from the collieries and mines of the Defendants in the first suit in the pleadings mentioned, or

any of them, over or through the roads or passages under the Plaintiffs' said farm. 3. An inquiry what amount, upon the result of the inquiry last directed, ought to be paid by the Defendants in the first suit to the Plaintiffs in the first suit for wayleave and royalty in respect of the user by the Defendants in the first suit of the said roads and passages for the purpose of working their said collieries and mines. 4. An inquiry whether the said farm and the mineral property of the Plaintiffs in the first suit under the same have sustained any, and if any, what amount of damage by reason of the manner in which the Defendants in the first suit have worked the coal, ironstone, and other produce under the Plaintiffs' said farm.

R. Fothergill died on the 19th of September, 1881, and the suit of *Phillips* v. *Homfray* was revived against the Defendant *Mary Fothergill*, as executrix of his will. In consequence of litigation with the lady of the manor in which the Plaintiffs' farm is situate (see *Llanover* v. *Homfray* (1)) the above inquiries in *Phillips* v. *Homfray* were not proceeded with until July, 1882, when an order was made by Mr. Justice *Kay* in Chambers directing that the inquiry should be made by the official referee, who, after hearing the parties for some days, adjourned the case until the 1st of July, 1883.

In February, 1883, a motion was made by Mrs. *Fothergill* before Mr. Justice *Pearson* that all proceedings under the second, third, and fourth inquiries might be stayed, and the official referee directed not to proceed with them. The motion was argued on the 15th, 17th, and 20th of February, 1883.

Rigby, Q.C., and *Osler*, for the motion:—

These inquiries having been ordered by the Court in 1871, the sum which may be found due from *R. Fothergill* under them will be damages for a trespass or personal tort, and as to that the rule *actio personalis moritur cum personâ* will apply, therefore *Mary Fothergill*, the executrix, will not be liable. The form of the decree which was made shews this clearly, because the executor of *W. H. Forman*, who died in August, 1869, was not held to be liable in respect of the wayleave, but only for the value of the

(1) 19 Ch. D. 224.

C. A. 1883 PHILLIPS v. HOMFRAY.

coal which was wrongfully gotten, and he was not held to be liable for any damages. Lord *Hatherley*, in his judgment (1), said, that under the old practice there would have been a bill for discovery, and then an action for damages in respect of it would have been brought, but the Court had now the power to grant compensation in respect of a continuously accruing damage *de die in diem* arising from a continuous trespass underground. "These damages cannot be better assessed than by an inquiry what is fit and proper to be paid for wayleave for the coals carried through the property."

In the case of *Powell* v. *Aiken* (2) Lord *Hatherley*, when Vice-Chancellor, had the same question before him, and there he refused to grant relief against an executor in respect of a wayleave. His Lordship's decision in the case now before the Court proceeded upon no equitable doctrine, but merely upon the law as applicable to it, and he intended to give, under *Lord Cairns' Act* (21 & 22 Vict. c. 27), the same damages as would be given if there had been an action at law to recover them. In order that the right should survive there must have been actual judgment for an ascertained amount, by which *actio transit in rem judicatam*, and which makes executors or the estate liable. A judgment, interlocutory, is not sufficient. An action for libel will not survive: *Ireland* v. *Champneys* (3).

[They also referred to the cases of *Fort* v. *Oliver* (4), *Smith* v. *Eyles* (5), in which case the judgment was that *quod computat* did not pass *in rem judicatam* till there was a final decree: *Weston* v. *James* (6), *Kirk* v. *Todd* (7), and *Birch* v. *Wright* (8).]

As to inquiries Nos. 2 and 3, whatever may be said in reference to them, it is clear that as to inquiries No. 4 they are nothing more than a simple tort, and nothing has been done to bind *R. Fothergill's* estate.

G. Sangster Green, for the surviving executor of *W. H. Forman*, supported the motion.

(1) Law Rep. 6 Ch. 780, 781.
(2) 4 K. & J. 343.
(3) 4 Taunt. 884.
(4) 1 M. & S. 242.
(5) 2 Atk. 385.
(6) 1 Salk. 42.
(7) 21 Ch. D. 484.
(8) 1 T. R. 378.

Hastings, Q.C., and *Maclean*, for the Plaintiffs:—

The question which has been argued was never raised at the hearing. The rule of *actio personalis moritur cum personâ* applies only to a case of simple tort. The law is well settled that where the estate of a deceased wrongdoer has derived a profit from the wrong done, the rule does not apply. The right to recover the profit made as damages survives as against the executor of the wrongdoer: *Hambly* v. *Trott* (1); *Marquis of Lansdowne* v. *Marchioness Dowager of Lansdowne* (2); *Bishop of Winchester* v. *Knight* (3); *Peek* v. *Gurney* (4); *Kirk* v. *Todd* (5).

There can be no doubt that as to the wrongful acts referred to in the inquiries Nos. 2 and 3, the estate of *R. Fothergill* derived benefit therefrom, and for it the estate in the hands of his widow and executrix must be held to be liable.

Rigby, in reply.

[PEARSON, J.:—I do not require anything to be said in regard to the inquiry No. 4.]

The principle laid down in *Hambly* v. *Trott* may apply if this action had been one for use and occupation, which is for an implied contract arising out of tort. But the form of this action is trespass—tort pure and simple, and the facts proved shew that there was a trespass. An action for use and occupation would not have brought about the inquiries which were directed by the Court, but an inquiry as to the value of the land which had been used and occupied. Where the Plaintiffs have proceeded as for trespass, and have obtained a decree founded thereon, it is impossible that they can go on with their action as being one for use and occupation merely, and, in fact, such an action would not lie, the Plaintiffs' case being that the Defendants took their coal without leave.

[He referred to the cases of *Powell* v. *Rees* (6) and *Churchward* v. *Ford* (7).]

(1) 1 Cowp. 371.
(2) 1 Madd. 116.
(3) 1 P. Wms. 406.
(4) Law Rep. 6 H. L. 377.
(5) 21 Ch. D. 484.
(6) 7 Ad. & E. 426.
(7) 2 H. & N. 446.

C. A. 1883

PHILLIPS v. HOMFRAY.

Feb. 24. PEARSON, J. (after stating the facts as set forth in the report of this case (1)), continued:—

W. H. Forman died before Vice-Chancellor *Stuart* made his decree. His estate was represented by his executors, and it has been noticed, and properly noticed, and relied upon to some extent in the argument, that whereas *W. H. Forman's* estate was made liable for the value of the coal abstracted from the Messrs. *Phillips'* property, it was not made liable jointly with *Rowland Fothergill* and *Samuel Homfray*, who were both living at the time, for any compensation for the use of the wayleave or damages in respect of the improper working of the coal. [His Lordship then proceeded to state the other facts of the case, down to and including the death of *Rowland Fothergill*, and continued:—]

The present motion is made by *Rowland Fothergill's* representative that three out of the four of the inquiries directed by the decree of Vice-Chancellor *Stuart* on the 14th of March, 1870, may be stayed on the ground that this suit is, so far as those three inquiries are concerned, "*actio personalis quæ moritur cum personâ*," and that in consequence of the death of *Rowland Fothergill* no relief can be had against his estate, either in this suit or in any other. The first inquiry, which it is not sought to stay, is an inquiry as to the value of the coal abstracted from Messrs. *Phillips'* property. With regard to that it is admitted that *Rowland Fothergill's* estate is liable, and that that inquiry properly proceeds against his executrix. But with regard to the value of the rights of wayleave which the Defendants used over the Messrs. *Phillips'* property that was said to be simply damages in the strict sense of damages, as in an action against a person for battery or assault, that it was not an action which could by any possibility survive as against an executor, and that the inquiries relating to that ought to be stayed. These inquiries are two: first, as to the amount of coal carried over and through the Messrs. *Phillips'* property by the Defendants; and the second inquiry following upon that is, what ought to be charged for royalty for the use of the wayleave over the property through which the coal was so carried. The last inquiry is an inquiry which was left in the decree by

(1) Law Rep. 6 Ch. 770.

Lord Chancellor *Hatherley*, and it is in these terms:—[His Lordship read the words of the fourth inquiry.]

Now the rule as to actions which survive and which do not survive is not a matter of question or doubt at the present day, because the question was decided more than one hundred years ago in the case which was cited by Mr. *Hastings* of *Hambly* v. *Trott* (1), and it has been followed in all other cases since. Lord *Mansfield* there said, "Where the cause of action is money due, or a contract to be performed, gain or acquisition of the testator by the work and labour or property of another, or a promise of the testator, express or implied; where these are the causes of action the action survives against the executor. But where the cause of action is a tort or arises *ex delicto*, as is said in *Hole* v. *Bradford* (2), supposed to be by force and against the King's peace, there the action dies, as battery, false imprisonment, trespass, words, nuisance, obstructing lights, diverting a watercourse, escape against the sheriff, and many other cases of the like kind." And he quotes further on a case of Sir *Henry Sherrington*, who had cut down trees upon the Queen's land and converted them to his own use in his lifetime, and in which upon an information against his widow after his decease Mr. Justice *Manwood* said, "In every case where any price or value is set upon the thing in which the offence is committed, if the defendant dies his executor shall be chargeable; but where the action is for damages only in satisfaction of the injury done there his executor shall not be liable."

I believe that that has been the law ever since and is the law at the present day. I confess I had some doubt originally and for some time during the course of the argument as to whether or not the second and third inquiries were directed for the purpose of assessing according to the judgment of the Lord Chancellor damages only, or whether or not they were directed for the purpose of assessing the price to be paid by the wrongdoers here for the use and occupation which they had had of the Plaintiff's property, and I am glad to find on looking at Lord Chancellor *Hatherley's* judgment, when the case was before him, that he both entertained the same doubt and expressed it, for he says (3),

(1) 1 Cowp. 371, 375. (2) Sir T. Raym. 57. (3) Law Rep. 6 Ch. 780.

C. A. 1883 PHILLIPS v. HOMFRAY. Pearson, J.

"I at first felt some doubt as to compensation for wayleave, but on further consideration I think that on principle it ought to be given whether the cases have as yet gone that length or not. Here is a man doing a surreptitious act, which cannot be discovered except through the medium of a bill. Under the old practice there would have been a bill for discovery of the thing, and then an action for damages in respect of it would have been brought; but this Court has now the power to grant compensation in respect of a continuously accruing damage *de die in diem* arising from a continuous trespass underground which can only be stopped by injunction restraining any further conveyance of coal through the respondent's property. These damages cannot be better assessed than by an inquiry what is fit and proper to be paid for wayleave for the coals carried through the property. I therefore affirm that part of the decree."

I come, therefore, to the conclusion in my own mind, as well as intending to follow the judgment of Lord *Hatherley*, which I should do even if I entertained more doubt, that what is to be paid is in substance analogous to, and stands, as regards the wayleave, in the stead of the price to be paid for the conveyance of the coal, and that I must treat what is called, for want of a better word, "damages," assessed under the 2nd and 3rd inquiries, as what Lord *Hatherley* called "compensation in respect of a continuously accruing damage *de die in diem*."

It is really and truly paying back to the Plaintiffs part of the profit which the Defendants themselves received from using the wayleave instead of raising their coal by a more expensive and difficult way; and having arrived at that conclusion, I have really arrived at the decision which ought to be come to upon this motion. Mrs. *Fothergill*, on whose behalf the motion is made, admits that she is properly brought here, and is properly liable, so far as regards the estate of her testator, for the value of the coal dug out of the property, and if she is liable for that I cannot understand how she can escape liability for compensation for the use of the wayleave across the Plaintiff's property. It seems to me to stand on exactly the same footing, and to be governed by the same principle: it is not damages in the ordinary sense for personal injuries inflicted, but simply compensation which has to

be paid out of the estate of the testator, because that estate, in one way or another, derived profit from the use of the wayleave, and, therefore, I might here conclude what I have to say upon this motion, simply because I have come to the conclusion that the damages under the 2nd and 3rd inquiries are governed by exactly the same principle as those under the 1st inquiry, but my respect for the arguments which have been addressed to me leads me to say a word or two more. It was argued very strongly by Mr. *Rigby*, first, that at law where there is an interlocutory judgment, and the Defendant dies between interlocutory and final judgment, the action cannot be revived, and that, therefore, there can be no revivor here. It was argued, also, very strongly, that if with regard to the wayleave there could be an action at law, it must be an action for use and occupation; but inasmuch as the whole of the action here is founded on trespass, it was said that it was impossible to go on with that action as an action for use and occupation: the very foundation of an action for trespass in itself putting an end to any question of use and occupation. I think Mr. *Rigby* is right in his contention with regard to use and occupation. I think it is quite plain that this is not an action for use and occupation. But I should like to call attention to what Lord *Mansfield* said in *Hambly* v. *Trott* (1) with regard to actions which survive and the manner in which they ought to be dealt with. He said in the course of the first argument, for there were two arguments in that case, "The fundamental point to be considered in this case is whether, if a man gets the property of another into his hands, it may be recovered against his executors in the form of an action of trover where there is an action against the executors in another form. It is merely a distinction whether the relief shall be in this form or that. Suppose the testator had sold the sheep, &c., in question, in that case an action for money had and received would lie. Suppose the testator had left them in specie to the executors, the conversion must have been laid against the executors. There is no difficulty as to the administration of the assets, because they are not the testator's own property. Suppose the testator had consumed them and had eaten the sheep, what action would have lain then? Is the executor

(1) 1 Cowp. 371, 373, 377.

C. A. 1883 PHILLIPS v. HOMFRAY. Pearson, J.

to get off altogether? I shall be very sorry to decide that trover will not lie if there is no other remedy for the right." And Mr. Justice *Aston* said, "Suppose the executor had had a counter-demand against the plaintiff, he could not have set it off in trover; but in an action for money had and received he might. If these things had been left by the testator in specie, the conversion must have been laid to be by the executor. There seems to be but little difference between actions of trover and actions for money had and received. As at present advised, I incline to think trover maintainable in this case."

Well, there was a second argument in which they came to the conclusion that trover would not lie, and this is the end of the judgment: "The form of the plea is decisive, namely, that the testator was not guilty; and the issue is to try the guilt of the testator. And no mischief is done: for, so far as the cause of action does not arise *ex delicto* or *ex maleficio* of the testator, but is founded in a duty which the testator owes the plaintiff; upon principles of civil obligation, another form of action may be brought, as an action for money had and received. Therefore, we are all of opinion that the judgment must be arrested." The real decision in that case was, not that the action did not survive, but simply that the form of action was wrong; that instead of an action of trover it ought to have been an action for money had and received; that if an action of trover were brought conversion ought to be laid, and that it must be conversion by the executor and not by the testator: and, taking the principle which certainly ought to be the governing principle in a Court of Equity, and more especially in a case of mines, with regard to which relief can be given in a much wider way than in other similar actions, because the Court treats mines as a sort of trade or business, I should be very sorry if I thought I was fettered by the form of this action, and ought to remit the Plaintiffs to bring some other action against the executor in order to obtain that right which, so far as I can see and so far as I know, without infringing any rule of equity they can obtain in this present action. I know nothing whatever in the form of this action which would compel me to nonsuit the Plaintiffs. Therefore I must hold that Mrs. *Fothergill* is rightly brought here, and is certainly liable for any

damages which may be assessed under the 2nd and 3rd inquiries in the same way as under the 1st. With regard to the 4th inquiry, I intimated in the course of the argument, and I reiterate the opinion, that these are damages in the same sense in which a man recovers damages for battery or assault—compensation for a personal injury—and cannot be held answerable by the executrix on the ground of any profit derived therefrom by the estate of the testator. I therefore must stay the 4th inquiry, but as regards the 2nd and 3rd inquiries the motion must be refused.

C. A. 1883 PHILLIPS v. HOMFRAY. Pearson, J.

T. F. M.

Mrs. *Fothergill* appealed against this order as regarded inquiries 2 and 3, and the Plaintiffs gave cross-notice of appeal against it as regarded inquiry 4. The appeals were argued on the 22nd and 30th of May, 1883.

C. A.

Rigby, Q.C., and *Osler*, for *Fothergill's* executrix :—

The trespasses which form the subject of inquiries 2, 3 and 4 are personal trespasses in tort, and give no right of action against the executors of the trespasser. The Court of Chancery could not give damages in respect of wayleave: *Powell* v. *Aiken* (1). It makes no difference that the trespasser made a profit by the trespass. Unless some part of the Plaintiff's property can be traced into the trespasser's estate, or unless the damages were assessed before the trespasser's death, his estate cannot be made liable after his death: *Peek* v. *Gurney* (2).

[BOWEN, L.J.:—In many cases you may waive the tort and claim damages on the implied contract.]

For the use of real estate you cannot get damages for use and occupation if you treat the Defendant as a trespasser: *Birch* v. *Wright* (3). If there is nothing before the jury except that the Plaintiff is owner and the Defendant is in possession, they may presume that the Defendant was in possession with the leave of the Plaintiff, and may give damages for use and occupation. But if there is evidence that the Defendant is a trespasser, a claim for use and occupation will not lie. You must be able to imply a

(1) 4 K. & J. 343. (2) Law Rep. 6 H. L. 377.
(3) 1 T. R. 378.

C. A. 1883 PHILLIPS v. HOMFRAY.

contract: *Churchward* v. *Ford* (1); *Tew* v. *Jones* (2). You cannot get mesne profits against the executor of a person who has been in unlawful possession, because it is a trespass: *Mayne* on Damages (3); *Adams* on Ejectment (4); *Pulteney* v. *Warren* (5).

In the present case *Fothergill* was treated as a trespasser from first to last, and the Plaintiffs could not have recovered damages for use and occupation: *Turner* v. *Cameron's Coalbrook Steam Coal Company* (6); *Kirk* v. *Todd* (7). The latter case goes too far in saying that the testator got no benefit, for he did get a benefit.

[BAGGALLAY, L.J.:—Lord *Mansfield* says in *Hambly* v. *Trott* (8) that if a man takes the horse of another an action for the use and hire of the horse will lie against his executor on an implied *assumpsit*.]

If Lord *Mansfield* is right in saying that you can bring an action against executors in such a case, that does not apply to real estate: *Bishop of Winchester* v. *Knight* (9).

[BAGGALLAY, L.J.:—A decree was actually made against *Fothergill* in his lifetime.]

Yes; but the damages had not been assessed. Therefore the proceedings against him were not complete: *Wheatley* v. *Lane* (10), *Smith* v. *Eyles* (11).

Hastings, Q.C., and *Maclean*, for the Plaintiffs:—

Whenever a wrongful act has been productive of benefit to the testator's estate, the injured person may follow the profit and recover against the estate: *Hambly* v. *Trott*. We claim to recover from the testator's estate the profit which he got by his wrongful act. The real question is whether the testator's estate has been increased: *Monypenny* v. *Bristow* (12).

[BOWEN, L.J.:—The damages against *Fothergill* in his lifetime were twofold: first, in respect of the damage done to the

(1) 2 H. & N. 446.
(2) 13 M. & W. 12.
(3) 3rd Ed. p. 391.
(4) 4th Ed. p. 336.
(5) 6 Ves. 73.
(6) 5 Ex. 932.
(7) 21 Ch. D. 484.
(8) 1 Cowp. 371.
(9) 1 P. Wms. 406.
(10) 1 Wms. Saund. 216a.
(11) 2 Atk. 385.
(12) 2 Russ. & My. 117.

Plaintiffs; and secondly, in respect of the profit which *Fothergill* had made and which he ought to have paid over to the Plaintiffs. When he died why do not the latter survive though the first do not?]

[COTTON, L.J.:—One difficulty is, that the Plaintiffs did not waive the tort, but insisted on it, and elected to bring their action in that form. Then, how can they now go on against the executrix?]

The Appellant refers to *Pulteney* v. *Warren* (1), but that case destroys the Defendant's position in equity. There was here a fraudulent concealment—had there not the Plaintiffs might have got a decree ten years sooner. The Plaintiffs could not with reasonable diligence have discovered the fraud earlier, so the *Statute of Limitations* is no defence: *Ecclesiastical Commissioners* v. *North Eastern Railway Company* (2).

[COTTON, L.J.:—Is there any case where it has been held that fraudulent concealment prevents the application of the rule *actio personalis moritur cum personâ?*]

The precise point does not appear ever to have been raised. Even if the executors could not be sued at law there are here equitable circumstances which entitle the Plaintiffs to sue for *mesne* rents and profits according to the principles laid down by Lord *Eldon* in *Pulteney* v. *Warren* (3). Now as to the cases referred to by the Appellant. In *Powell* v. *Aiken* (4) the person against whom the relief was sought was not the person who had made the passages, and if the context is taken into account it is clear that the expressions of the Vice-Chancellor, on which the Appellant relies, refer to consequential damages, not to profit derived by the wrongdoer from the trespass. In *Bishop of Winchester* v. *Knight* (5) it is only said that a trespass of breaking up meadow or ancient pasture ground dies with the person. That is a mere case of damage from which the trespasser does not derive profits. The case of mines, as observed by Lord *Eldon* in *Pulteney*

(1) 6 Ves. 73.
(2) 4 Ch. D. 845.
(3) 6 Ves. 73, 88, 93.
(4) 4 K. & J. 343.
(5) 1 P. Wms. 406.

C. A. 1883 PHILLIPS v. HOMFRAY.

v. *Warren* (1), stands on quite a different footing. Then the Appellant contends that the frame of the decree precludes the Plaintiffs from raising this question, for that it is framed in tort, and *Smith* v. *Eyles* (2) is relied upon as supporting the proposition that though a decree is prefaced by a declaration that a party is bound to make compensation, still the decree cannot be prosecuted after the death of the party; but the case really decided nothing as to whether the decree could be prosecuted, it only decided that a decree to account did not prevent the executor from suffering a judgment which would have priority over the plaintiff's claim. It assumes, in fact, that the decree could be prosecuted. The decree in the present case really is not framed in tort, it gives compensation for use and occupation, and is substantially a decree for payment of the profits derived from the use of a wayleave. There is no analogy between a common law inquiry as to damages and a case like this. In *Monypenny* v. *Bristow* (3) a suit was held maintainable against an executor for rents wrongfully received by his testator, on the express ground that where an injury is accompanied by a profit to the trespasser the party injured may waive the tort and bring an action for the profit. The decree was made in *Fothergill's* lifetime and fixes his liability. What remained to be done was only of a ministerial character and ought to be proceeded with. As to the 4th inquiry it sounds like a mere case of unliquidated damages, but it is so connected with inquiry 1, that it must go with it.

[COTTON, L.J.:—Inquiries 1 and 4 seem to me quite distinct.]

Rigby, in reply:—

The language of the Lord Chancellor in this case points only at damages for a continuing trespass. He gives damages, not measured by what the Plaintiffs lose or the Defendants get, but damages as to the *quantum* of which there is a discretion.

[COTTON, L.J.:—Is not the benefit derived by the trespasser the measure.]

Lord *Hatherley* would not have given that answer—he goes on

(1) 6 Ves. 73. (2) 2 Atk. 385.
(3) 2 Russ. & My. 117.

what a person would usually have to pay for a wayleave. The words of Lord *Mansfield* in *Hambly* v. *Trott* (1) have always been treated as laying down the correct rule.

[BAGGALLAY, L.J.:—Do you say that if a trespasser gets a pecuniary benefit that benefit cannot be recovered?]

I do say so. If a person occupies my land and gets profit by allowing persons to pass over it, I cannot sue for the money he so receives, my only remedy is to sue for damages for the trespass.

[BOWEN, L.J.:—Would not an action for money had and received lie if an office the holder of which received fees was usurped?]

Yes; the fees are incident to the office, it is like a trespasser on land receiving rents from the tenants.

[BAGGALLAY, L.J.:—What do you say to Lord *Mansfield's* illustration in *Hambly* v. *Trott* as to the horse?]

It is the only part of *Hambly* v. *Trott* that is against me, and it is not supported by any other authority.

July 9. BOWEN, L.J., delivered the judgment of Lord Justice *Cotton* and himself. His Lordship, after stating the proceedings as above down to the application to Mr. Justice *Pearson*, proceeded as follows:—

Mr. Justice *Pearson* stayed the 4th inquiry on the ground that it had necessarily abated by reason of the death of *R. Fothergill*, but refused to stay the 2nd and 3rd inquiries.

The Defendant *Mary Fothergill* has appealed against his refusal to stay the 2nd and 3rd of these inquiries, while the Plaintiffs, by their cross-appeal, complain of his decision that the 4th inquiry is to be stayed; and the question raised in both appeals is how far the respective inquiries, and the Plaintiffs' claim in virtue of which they were directed, are affected by the principle *actio personalis moritur cum personâ*.

The Plaintiffs' claim out of which the 2nd and 3rd inquiries spring is a claim to be compensated for the secret and tortious

(1) 1 Cowp. 371, 376.

C. A. 1883 PHILLIPS v. HOMFRAY.

use made by the deceased *R. Fothergill* and others during his lifetime of the underground ways and passages under the Plaintiffs' farm for the purpose of conveying the coal and ironstone of *R. Fothergill* and his co-trespassers. The judgment of Mr. Justice *Pearson* as to these two inquiries is based upon the view that this description of claim did not abate upon *R. Fothergill's* death, but was capable of being prosecuted against the assets in the hands of his executrix. That it is in form a claim in the nature of a claim for trespass, the damages for which were to be measured by the amount of wayleave which the Defendants would have had to pay for permission to use the Plaintiffs' ways and passages, cannot be disputed. But Mr. Justice *Pearson* was of opinion that this was one of the class of cases in which a deceased man's estate remained liable for a profit derived by it out of his wrongful acts during his lifetime. The learned Judge founded his opinion upon certain language of Lord *Mansfield* in the case of *Hambly* v. *Trott* (1), to the effect that, so far as the act of the offender had been beneficial to himself, his assets ought to be answerable. We have therefore to consider, in the first place, what is the true limit and meaning of the rule that a personal action dies upon a defendant's death, and whether there is, or can be, in the circumstances raised by the case, a profit received by his assets, which the Plaintiffs can follow.

The only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to us to be those in which property, or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or moneys. In such cases, whatever the original form of action, it is in substance brought to recover property, or its proceeds or value, and by amendment could be made such in form as well as in substance. In such cases the action, though arising out of a wrongful act, does not die with the person. The property or the proceeds or value which, in the lifetime of the wrongdoer, could have been recovered from him, can be traced after his death to his assets, and recaptured by the rightful owner there. But it is not every

(1) 1 Cowp. 374.

wrongful act by which a wrongdoer indirectly benefits that falls under this head, if the benefit does not consist in the acquisition of property, or its proceeds or value. Where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff, and the damages which have been done to him are unliquidated and uncertain, the executors of a wrongdoer cannot be sued merely because it was worth the wrongdoer's while to commit the act which is complained of, and an indirect benefit may have been reaped thereby. Two illustrations can be given of the above distinction with regard to the liability of executors. The produce, proceeds, or value, of waste, equitable or legal, committed by a tenant for life, can be followed into the hands of his executors, and retaken from them. If he has wrongly cut timber, the timber or its proceeds or value can be followed. But no action for waste—permissive or voluntary—as such, lies against the executors of a tenant for life. By non-repairing a house, or by ploughing up ancient meadow, the tenant for life may have indirectly benefited himself or saved his own pocket. But neither law nor equity recognise in this indirect benefit which he may have received any ground for proceedings against his executors. A second illustration may be given of the distinction we have referred to. The rents, or the produce or profits, of land, which have wrongly been received by a person other than the rightful owner (as a rule, and subject to certain exceptions, that we need not now discuss), may be pursued by the rightful owner, and recovered from the wrongdoer, or if he is dead from his estate. But there is a sense in which the term "profits" is used, with reference to land, to represent the unliquidated damages recoverable in respect of a trespass, as when an action for mesne profits is maintained, to recover, not the rents or produce of land, or their natural equivalent, but compensation for the bare possession wrongfully taken and held of the land itself. An action for mesne profits in this narrower sense will not lie at common law and apart from statute against executors, and no account would be decreed in equity, except in a case where the profits were either property or the produce, or profits, or value of property actually received. This line of demarcation has drawn itself in conformity with the classifications of forms of action known to

C. A. 1883 PHILLIPS v. HOMFRAY.

the English law. As long as the maxim *actio personalis moritur cum personâ* is preserved by the law of this country, the line drawn is neither inconvenient nor unreasonable. If every wrongful act which was attended consequentially and indirectly with advantage to the wrongdoer or his pocket were to warrant an action against executors, it would be impossible to know when executors were liable or not, and the maxim would, in fact, become a mere source of litigation. We have not now to consider the policy of the maxim. It is part of the law, and while it is so, ought not to be frittered away.

The judgment, however, of Mr. Justice *Pearson* is based upon certain *dicta* of Lord *Mansfield* in *Hambly* v. *Trott* (1), which are in form ambiguous, and it is necessary accordingly to examine these *dicta* with reference to the history of the maxim *actio personalis moritur cum personâ*. Whatever its wisdom or policy, the rule with certain limitations and explanations is as old as the English law. By the civil law, penal actions arising from wrong were not generally available against the heir, and certain actions *ex contractu* fell under the same disability. By the English law an executor represents the debts and property, but not the person of the testator. It seems to have been thought that there would be an injustice in making the executor stand in the place of the dead man when the causes of action were purely personal (see Year Book (2)). "The taking up of an executorship," says *Bacon* in his Abridgement, Executors (3), "is an engagement to answer all debts of the deceased and all undertakings that create a debt, as far as there are assets, but doth not embark the executor in the personal trusts of the deceased, nor is he obliged to answer for his several injuries, for none can tell how they might have been discharged or answered by the testator himself." And even in some actions of contract, such as debt, where the testator could have waged his law, the executor was not held liable, for this would have been to deprive his executor of the benefit of the wager of law. As regards all actions essentially based on tort, the principle was inflexibly applied. There was, however, a species of personal actions to which the rule in question was not extended.

(1) 1 Cowp. 374.

(2) 19 H. 6, 66 B.

(3) 7th Ed. vol. iii. p. 537.

These were such as were founded upon some obligation, contract, debt, covenant, or other duty to be performed: see *Pinchon's Case* (1); *Wheatley* v. *Lane* (2). If an injury has been done to the personal property of the plaintiff, for relief arising out of which assumpsit could be brought (as in the case of actions against carriers and bailees), the executors of the deceased might still be sued. It was urged before us on behalf of the Plaintiffs that they were entitled in the present case to waive the tort which had been committed against them by the deceased, and to treat the claim as substantially one of implied contract or account, upon the theory of an implied promise by him to pay for what he had done, or at all events on the principle that his estate had reaped some measurable benefit or profit from the wrong, which the executrix was not entitled as against the Plaintiffs to retain. Reference was made to the analogy of the cases where an action for money had and received has been held to be maintainable for the proceeds of goods wrongfully sold, and to a more doubtful class of authorities in which it has been suggested that use and occupation would lie for the enjoyment of lands occupied, even in the absence of any demise by the plaintiff. It seems to us, as we have said, that the profits arising from a wrong done by a deceased man which can be followed against his estate are only such profits as take the shape of property or the proceeds or value of property withdrawn from the rightful owner and acquired by the wrongdoer. But in order to understand Lord *Mansfield* and the argument to which reference has been made, it is desirable to begin with some cases in the reign of *Elizabeth* which illustrate the matter.

The first is that of Sir *Henry Sherrington* (cited in *Savile* (3) and referred to by Lord *Mansfield* in *Hambly* v. *Trott* (4)). Sir *Henry Sherrington* had cut during his lifetime and converted to his own use certain oaks and growing trees upon land belonging to the Queen. After his death the Attorney-General exhibited an information against his executrix, and Chief Justice *Manwood* in giving judgment has used language which it seems to us has been misunderstood: "In every case," he says, "in which a price or

(1) 9 Rep. 86 b.
(2) 1 Wms. Saund. 216 a.
(3) Page 40.
(4) 1 Cowp. 371.

C. A. 1883 PHILLIPS v. HOMFRAY.

value has been set upon a thing in which the offence is committed, if the offender dies his executors shall be chargeable. As in this case the information is for cutting 100 oaks to the value of £100, or for taking 20 cattle of the Queen, price £20, the executors are chargeable, but where the action or information is for trampling the herbage, &c., *ad damnum*, the executor shall not be chargeable." The point of this judgment seems to us to be that the deceased had converted the Queen's property to his own use during his lifetime, and the Attorney-General was held entitled to recover for the Queen the property, or in default the value which represented the property or its proceeds. In *Sir Brian Tucke's Case* in the same reign (1), it was held by the Barons of the Exchequer that the executor of an executor should not be charged with a *devastavit* made by the executor of the first testator, "No, not in the case of the King, because it is a personal wrong only." The collocation of these two cases points to the distinction which we have drawn. The proceeds or value of actual property acquired wrongfully by the testator can be recovered against an executor, but the mere fact that the wrongful act or neglect saved the testator from expense is not sufficient justification for suing his executor.

In *Tooley* v. *Windham* (2) the plaintiff brought an action against the defendants under the following circumstances. The defendant's father in his lifetime had taken the profits of certain lands, whereupon the plaintiff had purchased a writ out of Chancery against the defendant with the intention of exhibiting a bill against him. Upon the return of the writ for the said profits the defendant, in consideration that the plaintiff would forbear his suit, promised the plaintiff that if he would prove that his father had taken the profits or had had the possession of the lands under the title of the plaintiff's father, he the defendant would pay the plaintiff for the profits of the land. The Court held that this was no consideration for the promise, on the ground that the taking of the profits of the plaintiff's lands by the defendant's father was a personal tort for which neither the executor nor heir could be made to answer. So far as we are aware an action for mesne profits (or bare damages for wrongful possession

(1) 3 Leon. 241. (2) Cro. Eliz. 206.

or occupation of land) has never been considered maintainable at common law against the executors of the person who was wrongfully in possession.

But the language of Lord *Mansfield* in the case of *Hambly* v. *Trott* (1) is relied upon in the judgment of Mr. Justice *Pearson* as going beyond the above line, and it is important, therefore, to examine it in detail. That action was an action of trover brought against an administrator with the will annexed for a conversion by the testator in his lifetime. The plea was that the testator was not guilty. A verdict having been found for the plaintiff, the Court unanimously arrested the judgment on the ground that the cause of action as laid was a personal tort which died with the person. This was in accordance with the decision in *Baily's Case* (2). The judgment in *Hambly* v. *Trott* can therefore be no authority for the Appellants' contention, but the language of Lord *Mansfield*, which has since been cited with approval by the highest tribunals, is of course entitled to the utmost weight. Lord *Mansfield* in the first place observes that no action of tort where the plea must be 'not guilty' will lie against an executor. "On the face of such a record the cause of action arises *ex delicto*, and all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender." This is the inflexible rule. In mitigation of the apparent hardship Lord *Mansfield* proceeds, *obiter dicta*, to point out that in most cases where trover lies against the testator another action might be brought against the executor which will serve the purpose, and he gives the following illustration. An action on the custom of the realm against a common carrier is for a tort and a supposed crime. The plea is not guilty, therefore such action will not lie against an executor. But assumpsit, which is another action for the same cause, will lie instead. "So," continues Lord *Mansfield*, "if a man takes a horse from another, and bring him back again, an action of trespass will not lie against his executor, though it would against him; but an action for the use and hire of the horse will lie against the executor." And in further illustration of this distinction Lord *Mansfield* points out that in *Baily's Case* the executor would have been liable for the value of the goods wrongfully sold by the

(1) 1 Cowp. 375. (2) Sir T. Raym. 71.

C. A. 1883 PHILLIPS v. HOMFRAY.

testator, just as *Sir Henry Sherrington's Estate* (1) was liable for the value of the trees he had cut and carried away. It is with reference to the above distinction that Lord *Mansfield* goes on to use the language which we think has been misunderstood. "Here, therefore, is a fundamental distinction. If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, &c., there the person injured has only a reparation for the *delictum* in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As, for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees he shall. So far as the tort itself goes an executor shall not be liable, and therefore it is that all public and all private crimes die with the offender, and the executor is not chargeable; but so far as the act of the offender is beneficial his assets ought to be answerable, and his executor therefore shall be charged." It seems to us that Lord *Mansfield* does no more than indicate that there is a class of cases in which assumpsit can be brought against a wrongdoer to recover the property he has taken or its proceeds or value, and that in such cases the action will survive against the executor. In the illustration given by him of the horse, he does not mean that an action for the use and hire of a horse wrongfully taken will always lie against an executor, but that it will lie whenever a similar action would have lain against the wrongdoer himself. The case he puts is the case of a horse taken and restored, not of a horse taken and held under an adverse claim, and we are not prepared to say that, if absolutely nothing appeared in evidence except that a horse was taken and was afterwards brought back again, the owner might not recover for the use and hire of the horse on the hypothesis of an implied contract to pay for him. It is in such a sense that Lord *Ellenborough*, in *Foster* v. *Stewart* (2), clearly understood Lord *Mansfield's* language. We see nothing in the language of Lord *Chelmsford* in the House of Lords in *Peek* v. *Gurney* (3) to indicate that he understood it otherwise. If so, the

(1) Savile, 40. (2) 3 M. & S. 191. (3) Law Rep. 6 H. L. 393.

true test to be applied in the present case is whether the Plaintiffs' claim against the deceased *R. Fothergill*, in respect of which inquiries 2 and 3 were directed in his lifetime, belongs to the category of actions *ex delicto*, or whether any form of action against the executors of the deceased, or the deceased man in his lifetime, can be based upon any implied contract or duty. In other words, could the Plaintiffs have sued the deceased at law in any form of action in which "Not guilty" would not be the proper plea? If such alternative form of action could be conceived it must be either an action for the use, by the Plaintiff's permission, of the Plaintiff's roads and passages, similar in principle, though not identical, with an action for the use and occupation of the Plaintiffs' land. Or it must be in the shape of an action for money had and received, based upon the supposition that funds are in the hands of the executors which properly belong in law or in equity to the Plaintiffs. We do not believe that the principle of waiving a tort and suing in contract can be carried further than this—that a plaintiff is entitled, if he chooses it, to abstain from treating as a wrong the acts of the defendant in cases where, independently of the question of wrong, the plaintiff could make a case for relief. There have been, no doubt, instances in which, nothing further appearing in evidence but that one person is the owner of land and that another had taken possession of and enjoyed it, an action for use and occupation under the statute has been upheld: see *Hellier* v. *Sillcox* (1). In such cases the inference, in the absence of proof to the contrary, has been allowed to be drawn, that the enjoyment was by permission of the rightful owner. On a somewhat similar principle an action by the lord of a market for stallage was held maintainable against a person who fixed a stall in the soil without leave or license. The authority of this latter case has been questioned, see *Turner* v. *Cameron's Coalbrook Steam Coal Company* (2); and actions for use and occupation, according to the better opinion, have been confined to the class of cases where defendant is not a trespasser setting up an adverse title, and where there are no circumstances that negative the implication of a contract: see *Churchward* v. *Ford* (3), *per*

(1) 19 L. J. (Q.B.) 295. (2) 5 Ex. 932.
(3) 2 H. & N. 446.

C. A. 1883 PHILLIPS v. HOMFRAY.

Pollock, C.B.; *Birch* v. *Wright* (1). No doubt the mere enjoyment by one man of another man's property, real or personal, may be had under such circumstances as leave still open, as a reasonable inference, the presumption that it is taken on the terms of payment, just as a man who takes a bun from the refreshment counter at a railway station, takes it on the implied promise to pay for it. So actions of assumpsit have been held to lie for the rents of land improperly received under pretence of title: see *Bacon's* Abridgement, Assumpsit (2); *Clarence* v. *Marshall, per Bayley*, B. (3).

One of the most remarkable instances of waiver of a tort is to be found in the case of *Lightly* v. *Clouston* (4), where the master of an apprentice who had been seduced from his service to work for another person was held justified in waiving the tort and bringing an action of *indebitatus assumpsit* for work and labour done against the tortfeasor. Lord *Mansfield*, in deciding the case, referred to the cases of the wrongful sale of goods, where, if the rightful owner chooses to sue for the produce of the sale, he may do it, the practice being an advantage and not a disadvantage to the defendant. The case was decided upon the ground that the labour of the apprentice belonged to his master, who might insist on an equivalent for it, or at all events, that the apprentice could not contract for the benefit of anybody except his rightful owner (see *per* Lord *Ellenborough* in *Foster* v. *Stewart* (5)). And actions in which the owners of goods wrongfully sold were held entitled to waive the tort, and to recover in assumpsit for the proceeds, had become familiar to the common law as far back as towards the end of the 17th century: see *Lamine* v. *Dorrell* (6).

The difficulties of extending the above principle to the present case appear to us insuperable. The deceased, *R. Fothergill*, by carrying his coal and ironstone in secret over the Plaintiffs' roads took nothing from the Plaintiffs. The circumstances under which he used the road appear to us to negative the idea that he meant to pay for it. Nor have the assets of the deceased Defendant been necessarily swollen by what he has done. He saved his

(1) 1 T. R. 378.
(2) 7th Ed. vol. i. p. 336.
(3) 2 C. & M. 495.
(4) 1 Taunt. 112.
(5) 3 M. & S. 191.
(6) 2 Ld. Raym. 1216.

estate expense, but he did not bring into it any additional property or value belonging to another person. The case of *Kirk* v. *Todd* (1) seems to us materially in point. There the owners of certain dye-works sued the original defendants for fouling and polluting a brook. It was held that the action would not survive against their executors. The late Master of the Rolls used the following language: "This was an action on a simple tort. It did not appear that the defendant had got any benefit by fouling the plaintiffs' stream, he had only injured the plaintiff. As I understand the rule at common law it was this—you could not sue executors for a wrong committed by their testator for which you could recover only unliquidated damages. That rule has never been altered except by the Act 3 & 4 Will. 4, c. 42, which allowed the executors to be sued in certain cases, but with the limitation that the injury must have been committed not more than six months before the death of the testator. That was not so here; therefore the statute did not apply, and the rule of the common law remained in its simplicity." In every case where one man fouls the flow of water to which another is entitled he probably saves himself expense by doing so. But the benefit to which the Master of the Rolls alludes appears to us to be some beneficial property or value capable of being measured, followed, and recovered.

It remains to be considered whether there is any equitable doctrine which can extend or vary the above rules of the common law. We can see none. An action for account will only, under such circumstances, lie where the defendant has something in his hands representing the plaintiffs' property or the proceeds or value of it. But if there were any such it could be recovered at law as well as in equity. It is true that the wrongful acts complained of were done in secret, but even if such concealment could raise in favour of the plaintiffs an equity to be relieved from the application of the principle *actio personalis moritur cum personâ*, which we doubt, the fraud in this case was discovered during the lifetime of the deceased, *R. Fothergill*. The mere circumstance of the Defendant's death, after the decree and before the accounts taken, would not raise any equity in the Plaintiffs' favour, and as

(1) 21 Ch. D. 484, 488.

C. A. 1883 PHILLIPS v. HOMFRAY.

far as we can see the equity authorities relied upon in argument by the Plaintiffs do not assist them. In *Bishop of Winchester* v. *Knight* (1) it was held that the lord of the manor might maintain a bill for an account of ore dug or timber cut by the defendant's testator. Lord Chancellor *Cowper* in giving judgment said, "It would be a reproach to equity to say, that where a man has taken my property, as my ore, or timber, and disposed of it in his lifetime, and dies, that in this case I must be without remedy." But he added, that the trespass of breaking up meadow or ancient pasture-ground dies with the person. If the Plaintiffs in the present action were to recover, it is difficult to see why a landlord should not be entitled in equity to an account against the executors of his tenant, for a profit indirectly derived or expense saved by the testator through breaking up ancient meadow or pasture land. In *Pulteney* v. *Warren* (2) an account of mesne profits was decreed against executors on the special ground that the plaintiff had been prevented by injunction afterwards dissolved from proceeding in ejectment against the testator in his lifetime, and that it ought to have been one of the terms on which the injunction was granted that the testator or his estate would compensate the plaintiff against the loss of such mesne profits if the injunction turned out to be unjust. It would follow that, had not such special grounds existed, the bill for an account of mesne profits would have been held not maintainable against the executors. *Pulteney* v. *Warren* is therefore an authority which bears against the Plaintiffs in the present case. In *Monypenny* v. *Bristow* (3) a suit was held maintainable against the executors for rents received during the continuance in possession of the testatrix, but the rents in question seem to have been rents which had actually been paid over to the testatrix and fell within the description of property taken by the trespasser.

The history of the case of *Marquis of Lansdowne* v. *Marchioness Dowager of Lansdowne* (4) appears to us to shew that the doctrine of the Courts of Equity is in exact conformity with the distinction we have pointed out. A bill was filed by a remainderman against the representative of a deceased tenant for life without

(1) 1 P. Wms. 406, 407.
(2) 6 Ves. 73.
(3) 2 Russ. & My. 117.
(4) 1 Madd. 116.

impeachment for waste. Two causes of complaint were put forward by the bill. The first that the deceased tenant for life had been guilty of equitable waste by cutting down ornamental timber and young trees about the property. A second cause of complaint was dilapidations which he had permitted in and about the mansion-house. The defendants demurred to so much of the bill as related to the former grievance, and the demurrer was decided in favour of the plaintiff on the ground that the plaintiff was entitled to the proceeds of the equitable waste, and to relief against the assets of the tenant for life so far as they were augmented by such proceeds, and an account was directed as to the equitable waste. The second cause of complaint, which related to the dilapidations, was dealt with on the hearing (1). The Master of the Rolls decided that no account of the dilapidations could be decreed, observing that "with respect to incumbents the law was otherwise, and accordingly suits against their representatives were very common, but no instance of such suits by remaindermen had occurred." It has always been held that ecclesiastical dilapidations by deceased incumbents do not fall within the rule *actio personalis moritur cum personâ*. The fact that an account was granted in respect of the produce of the timber wrongly cut, but refused in respect of the dilapidations, shews that the profit which equity follows into the hands of the executors must be some profit of which the plaintiff has been deprived, and not merely a negative benefit which the testator may indirectly have acquired by saving himself the expense of performing his duty.

In *Gardiner* v. *Fell* (2) no doubt was suggested as to the right of the Court to decree an account of rents and profits against the personal representatives of a person who had taken possession under a mistake of law. It appears, however, to be probable, on the facts of the case, that the rents and profits in question were rents and profits actually received in the shape of moneys or actual property by the deceased, as distinguished from the mere wrongful use and occupation of land or houses.

It was pressed upon us by the counsel for the plaintiffs that, the decree having been made and the inquiries directed during

(1) 1 Jac. & W. 522. (2) 1 Jac. & W. 22.

C. A. 1883 PHILLIPS v. HOMFRAY.

the lifetime of the deceased *R. Fothergill*, his liability must be taken to have been pronounced, and that what remained to be done in the action was of a ministerial character only, and would not be affected by the maxim *actio personalis moritur cum personâ*. We cannot take this view. The claim of the Plaintiffs is in substance, so far as these inquiries are concerned, an action for trespass. The inquiries, whatever the form of language in which they are directed, are an assessment of damages, and until they have been completed the action is still undetermined. It is of the essence of the rule that claims which are indeterminate in their character shall not be pursued against the estate of a person after his death. If the claim is one for unliquidated damages, and has not been perfected by judgment at the time of the death of the Defendant, the rule applies: *Smith* v. *Eyles* (1). It appears to us accordingly that the claims of the Plaintiffs to which inquiries Nos. 2 and 3 are directed are claims for unliquidated damages in respect of a wrong done, and that the object of the inquiries is to assess such unliquidated damages. Such claims, and the inquiries which relate to them, abated in our opinion upon the death of the deceased, *R. Fothergill*. The appeal of the Defendant *Mary Fothergill* as to inquiries Nos. 2 and 3 will, therefore, be allowed, with costs. *A fortiori*, the claim in respect of which inquiry No. 4 was directed, is a pure claim for damages for a wrongful act. It follows that, in our opinion, such claim and the inquiry under it abated by the death of *R. Fothergill*. The Plaintiffs' cross-appeal must be dismissed accordingly, with costs. The order which Mr. Justice *Pearson* made as to inquiry No. 4 will thus be extended to inquiries Nos. 2 and 3.

BAGGALLAY, L.J.:—

I regret that, as regards the appeal of Mrs. *Fothergill*, I have arrived at a conclusion different from that which has been arrived at by the other members of the Court. I am of opinion that the appeal should be dismissed, for the reasons which I am about to state. Though the case of *Hambly* v. *Trott* (2) has been very fully considered by Mr. Justice *Pearson* in the course of his judgment, and also by my colleagues in that which has been just delivered,

(1) 2 Atk. 385. (2) 1 Cowp. 371.

I desire to add my own comments upon it, as its true effect has, in my opinion, been to some extent misapprehended.

The judgment in *Hambly* v. *Trott* (1) is generally referred to as that of Lord *Mansfield*, but it expressed the unanimous, fully-considered opinion of the Court, which included Justices *Acton* and *Ashurst*, as well as Lord *Mansfield*, and was delivered after the case had been twice argued. The action was in trover against an administrator with will annexed; the declaration laid an unlawful conversion by the testator to his own use of certain sheep, pigs, goats, oats, and cyder, the plea was that the testator was not guilty; the verdict being for the plaintiff, the Court was moved on behalf of the defendant in arrest of judgment upon the ground that the wrongful act of the testator was a personal tort which died with the person; a rule to shew cause was granted, and it was upon cause being shewn that the judgment was given. At the close of the arguments on the first occasion Lord *Mansfield* said, "I shall be very sorry to decide that trover will not lie if there is no other remedy for the right," and after an opinion expressed by the other Judges that as then advised they thought the action maintainable, the Court ordered the matter to stand over for further argument, Lord *Mansfield* adding, "The criterion I go upon is this, can justice possibly be done in any other form of action?" After the second argument on the 24th of January, 1776, the Court took time to consider its judgment, and on the 12th of February in the same year held that the judgment must be arrested. But it is important to notice the grounds upon which the Court arrived at this conclusion. After stating (*a*) that the maxim "*actio personalis moritur cum personâ*" was not generally true and much less universally so, and that it left the law undefined as to the kind of personal actions which die with the person or survive against the executor, and (*b*), that an action of trover was in form a fiction, and in substance founded on property, for the equitable purpose of recovering the value of the plaintiffs' specific property used and enjoyed by the defendant, and that if no other action could be brought against the executor it seemed unjust and inconvenient that the testator's assets should not be liable for the value of what belonged

(1) 1 Cowp. 371.

C. A. 1883 PHILLIPS v. HOMFRAY. Baggallay, L J.

to another man which the testator had reaped the benefit of; and (*c*), that the Court, deeming the matter well deserved consideration, had carefully examined all the cases upon the subject, Lord *Mansfield* proceeded to enunciate the conclusions at which the Court had arrived as to actions which survived against an executor, and those which died with the person, distinguishing between those which survived or died on account of the cause of action, and those which survived or died on account of the form of action, a distinction which it is in my opinion most important to bear in mind.

As regards those actions which survive or die on account of the cause of action, Lord *Mansfield* expressed himself as follows (1): "Where the cause of action is money due, or a contract to be performed, gain or acquisition of the testator by the work and labour or property of another, the action survives against the executor. But where the cause of action is a tort, or arises *ex delicto*, supposed to be by force and against the King's peace, there the action dies; as battery, false imprisonment, trespass, words, nuisance, obstructing lights, diverting a watercourse, escape against the sheriff, and many others of the like kind," and as regards those actions which survive or die in respect of the form of action, he went on to say as follows: "In some actions the defendant could have waged his law, and therefore no action in that form lies against an executor. But now other actions are substituted in their room upon the very same cause which do survive and lie against the executor. No action where in form the declaration must be *quare vi et armis et contra pacem*, or where the plea must be, as in this case, that the testator was not guilty, can lie against the executor. Upon the face of the record the cause of action arises *ex delicto*, and all private criminal injuries or wrongs, as well as all public crimes are buried with the offender." But having said thus much Lord *Mansfield* added, that in most, if not in all, of the cases where trover lies against the testator another action might be brought against the executor which would answer the purpose. In applying the rules so enunciated to the circumstances of the case then under consideration, the Court held that the form of the plea that the testator was not

(1) 1 Cowp. 375.

guilty was decisive, and that the judgment must be arrested, but added that no mischief would be thereby occasioned, because, so far as the cause of action did not arise *ex delicto* or *ex maleficio* of the testator, but was founded on a duty which the testator owed to the plaintiff, another form of action might be brought. It would appear then that the Judges who disposed of *Hambly* v. *Trott* (1) were of opinion, first, that the cause of action was such that the executors might have been made liable; secondly, that by reason of the form of the action, the declaration being in trover, and the plea that the testator was not guilty, it could not be maintained against the executors; and thirdly, and notwithstanding the arrest of judgment in the pending action, another form of action might be brought and maintained against the executors. It is to my mind clear that the Judges were of opinion that the merits were with the plaintiff, but that they were precluded by the technicalities of the pleadings from giving him that to which they deemed him morally entitled. That this was their view is supported by the comments of Lord *Mansfield* upon two older cases, which he cited in the course of the judgment. In the first of those cases, which was later in date than the other, and which he cited from Sir *Thomas Raymond*, the plaintiff declared that he was possessed of a cow which he delivered to the testator to keep for the use of the plaintiff, which cow the testator sold, and disposed of the money to his own use, and that neither the testator, nor the defendant his executor, had ever paid the money. Commenting upon this case Lord *Mansfield* said (2), "Upon this state of the case no one can doubt but that the executor was liable for the value. But the special injury charged obliged him to plead that the testator was not guilty." That is to say, the cause of action was such as to render the executor liable, but a form of action was adopted which obliged the defendant to plead that the testator was not guilty. The jury found the defendant guilty, but on motion for arrest of judgment it was held that the executor ought not to be chargeable. The other case cited was that known as Sir *Henry Sherrington's* (3). He had cut down trees upon the land of Queen

(1) 1 Cowp. 371. (2) 1 Cowp. 376.

(3) Savile, 40.

C. A. 1883 PHILLIPS v. HOMFRAY. Baggallay, L.J.

Elizabeth, and converted them to his own use. Upon an information against his widow, Justice *Manwood*, in the course of his judgment, said; "In every case where any price or value is set upon the thing in which the offence is committed, if the defendant dies his executor shall be chargeable, but where the action is for damages only, in satisfaction of the injury alone, there his executors shall not be liable." In further commenting upon these two cases, Lord *Mansfield* said (1): "Here therefore is a fundamental distinction. If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, &c., there the person injured has only a reparation for the *delictum* in damages to be assessed by a jury. But where besides the crime property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator from the value or sale of the trees he shall."

Upwards of 100 years have elapsed since this judgment in *Hambly* v. *Trott* (2) was delivered. It has ever since been regarded as an accurate representation of the state of the law as affecting executors in respect of causes of action and forms of action arising out of the acts of their testators. The circumstances under which the wrongful act with which we at present have to deal was committed may be concisely stated as follows:—In the year 1866 the Plaintiffs were the owners of a farm in *Monmouthshire*, and the Defendants, *Homfray*, *Fothergill*, and *Forman*, who carried on business under the style of the *Tredegar Iron Company*, had for some time past been working the minerals underlying lands adjoining the Plaintiffs' farm, and in the course of that year the Plaintiffs discovered that the Defendants were not only getting minerals from under the farm but were using roads and passages made by them through the Plaintiffs' minerals for the conveyance of minerals gotten by the Defendants from their own mines. In the observations I am about to make it is important to bear in mind the nature of the wrongful act in respect of which the Plaintiffs claim redress; but I deem it unnecessary to further

(1) 1 Cowp. 376. (2) 1 Cowp. 371.

refer to the institution and progress of the suit, as those have been sufficiently detailed in the judgment which has just been delivered. It has hardly been disputed on the present appeal that a remedy for a wrongful act can be pursued against the estate of a deceased person by whom the act has been committed, when property, or the proceeds of property, belonging to another have been appropriated by the deceased person, in other words that the action in such cases, though arising out of a wrongful act, does not die with the person; but it has been urged that the principle thus enunciated is limited to cases in which property, or the proceeds of property, have been appropriated by the deceased person, and that it does not apply to a case in which the deceased person has derived any other benefit from his wrongdoing than property or the proceeds of property, and in particular that it does not apply to a case in which the benefit derived has not been in the form of an actual acquisition of property, but of a saving of expenditure which must otherwise have been incurred by the wrongdoer, as in the present case, in which, for the purpose of the present argument, it must be assumed that by the use by the Defendants, for the carriage of their minerals, of the roads and passages under the Plaintiffs' farm, there was a saving to them of an expenditure which they must otherwise have incurred.

Speaking with much diffidence, as my views in this respect differ from those of my colleagues, I feel bound to say that I cannot appreciate the reasons upon which it is insisted that although executors are bound to account for any accretions to the property of their testator derived directly from his wrongful act, they are not liable for the amount or value of any other benefit which may be derived by his estate from or by reason of such wrongful act. I can find nothing in the language used by Lord *Mansfield* that can support this view. On the contrary, when classifying the actions which survive against an executor by reason of the causes of action, he includes among such causes of action "gain or acquisition by the testator by the work and labour or property of another," and he in no respect limits or qualifies the nature or character of the "gain" referred to. A gain or acquisition to the wrongdoer by the work and labour of another does not necessarily, if it does at all, imply a diminution

C. A. 1883 PHILLIPS v. HOMFRAY. Baggallay, L.J.

of the property of such other person. Whether the amount of the wayleave which a person could reasonably be called upon to pay for the use for the carriage of his minerals over the roads of another, would be a fair measure of the gain or acquisition to the property of the person who has so used them without paying any wayleave, is a question which it is not necessary to decide. I entertain no doubt as to there being ample means of ascertaining the amount of gain or acquisition to the property of a person so using the roads of another. That Lord *Mansfield* did not intend to limit the generality of the rule enunciated by him in the manner suggested is, I think, clear from the following observations made by him in the course of the first argument in *Hambly* v. *Trott* (1): "Suppose the testator had sold the sheep, &c., in question. In that case an action for money had and received would lie. Suppose the testator had left them in specie to the executors, the conversion must have been laid against the executors. Suppose the testator had consumed them and had eaten the sheep, what action would have lain there? Is the executor to get off altogether? I shall be very sorry to decide that trover will not lie if there is no other remedy for the right." It appears to me clear that in the opinion of Lord *Mansfield* the injured owner of the sheep was equally entitled to redress against the estate of the wrongdoer, whether the sheep were sold by him, or were consumed by him, or were left by him in specie at his death. Now, if the sheep had been consumed by the testator, the only accretion to his property derived from his so doing would have been the amount of the saving in his butcher's bill and I am unable to appreciate the distinction in principle between adding to his property by savings in the amount of his butcher's bills and by savings in the cost of carrying his minerals. Upon the whole, I have come to the conclusion that the causes of action which were the foundation of the decree made in the present suit, and to which I deem it unnecessary to more particularly refer, were such as, within the rule in *Hambly* v. *Trott* (2), to entitle the Plaintiffs to maintain their suit against Mrs. *Fothergill* as the executrix of the deceased Defendant *R. Fothergill* in respect of the subject-matter of the second and third inquiries directed by the decree.

(1) 1 Cowp. 373. (2) 1 Cowp. 371.

Whether the proceedings which the Plaintiffs have adopted for the purpose of enforcing their rights are in form such as to entitle Mrs. *Fothergill* to succeed in her appeal is a question the consideration of which I will postpone until after I have referred to some cases in equity which appear to me to have an important bearing upon it, but as to some of which the views formed by me in some respects differ from those expressed in the judgment of my colleagues.

The first case to which I will refer is that of *Garth* v. *Cotton* (1) decided by Lord *Hardwicke* in the year 1753. This was before the decision in *Hambly* v. *Trott* (2). The bill was for an account of all sums of money produced by a fall of timber in the year 1714. A number of objections were raised on the part of the Defendant, the seventh of which was stated by Lord *Hardwicke* (3) in the following terms: "I shall mention but one objection more, and that arises recently from the present state of the cause, as it comes before the Court upon a bill of revivor against the representative of Sir *John Hind Cotton*, the original defendant—that an action of waste dies with the person, and if the plaintiff had in other respects been in a condition to maintain waste against Sir *John Hind Cotton*, the party to the articles, it had been gone by his death; that the law is the same as to the action of trover: *pari ratione* he hath lost his equitable remedy for the waste." In meeting this objection Lord *Hardwicke* (4) said: "There have been several determinations in this Court where, by force of the rule *actio personalis moritur cum personâ*, the remedy at law hath been extinguished, yet equity hath given the like satisfaction;" and after referring to various authorities, he proceeded as follows (5): "I hold that in all cases of fraud the remedy doth not die with the person; but the same relief shall be had against an executor out of the assets of his testator as ought to have been given against the testator himself. For, as equity disclaims the maxim, that a personal remedy dies with the person, wherever the demand is proper for that jurisdiction; this Court will follow the estate of the party liable to that demand, and out of that decree satisfaction."

(1) 1 Dick. 183.
(2) 1 Cowp. 371.
(3) 1 Dick. 214.
(4) Ibid. 215.
(5) 1 Dick. 217.

C. A. 1883 PHILLIPS v. HOMFRAY. Baggallay, L.J.

In 1801 the case of *Pulteney* v. *Warren* (1) came before Lord *Eldon*. The bill prayed an account of mesne profits against the executors of one Dr. *Warren*. Under ordinary circumstances a bill in equity could not be maintained for an account of mesne profits, the proper jurisdiction being at law; and the substantial question was whether under the special circumstances of the case the suit could be maintained. The plaintiff had been prevented from recovering in ejectment by a rule of the Court of King's Bench staying proceedings against Dr. *Warren* to abide the result of proceedings in the House of Lords in another case, and also by an injunction at the instance of the occupier, who ultimately failed both at law and in equity. Lord *Eldon* held that these circumstances were sufficient to justify the plaintiff in commencing proceedings in equity, and having upheld the jurisdiction, he decreed the account prayed against Dr. *Warren's* executors, though it was strongly urged upon him that, having regard to the case of *Hambly* v. *Trott* (2), the remedy was gone by reason of the death of Dr. *Warren*. It being held that the demand of the plaintiff was one which could properly be entertained in equity, the common law maxim that the personal remedy died with the person was disregarded.

The case of *Marquis of Lansdowne* v. *Marchioness Dowager of Lansdowne* (3) came before the Vice-Chancellor Sir *Thomas Plumer* in 1815. The bill was against the representative of a deceased tenant for life, and prayed an account of equitable waste committed by him; on the part of the defendant it was urged that if the tenant for life had committed waste and died his representatives would not have been answerable, and that the same doctrine applied by analogy to equitable waste. In dealing with this argument Sir *Thomas Plumer* quoted in some detail the observations of Lord *Mansfield* in *Hambly* v. *Trott*, and added (4): "This I take to be a just exposition of the qualifications under which the maxim *actio personalis moritur cum personâ* is received at law; and, if equity is to decide in analogy to a Court of Law, the question in the present case will be whether, by the equitable waste committed by the late Marquis, he derived any benefit, or

(1) 6 Ves. 73.
(2) 1 Cowp. 371.
(3) 1 Madd. 116.
(4) Ibid. 139.

whether it was a naked injury by which his estate was not benefited? it is clear it was benefited; and as at law if legal waste be committed, and the party dies, an action for money had and received lies against his representative; so upon the same principle, in cases of equitable waste, the party must through his representatives refund in respect of the wrong he has done." The case was decided by Sir *Thomas Plumer* upon the broad principle that where equitable waste had been committed the Court had jurisdiction to make the representatives of the party committing such waste accountable.

Again, in *Monypenny* v. *Bristow* (1) the bill was filed by the heir of a testator against the personal representative of his widow, who, with the acquiescence of his heir, had been let into possession of certain freehold houses, under an erroneous supposition that they passed by the will along with other property in which a life interest was devised to her. She died before the error was discovered. The bill prayed delivery of the title deeds and an account of the rents received by the widow during her continuance in possession. It was urged by way of defence that these rents being wrongfully received by the widow could have been recovered in her lifetime only by an action of trespass, and that this suit being founded in tort died with her, but this contention was rejected by the Master of the Rolls, Sir *John Leach*, who, after referring to the judgment in *Hambly* v. *Trott* (2), decreed the account prayed. There was an appeal to the Lord Chancellor Lord *Brougham*, who dismissed the appeal and affirmed the decree of Sir *John Leach*.

The last case in equity to which I will refer is that of *Peek* v. *Gurney* (3). In that case it was sought to make the estate of Mr. *Gibbs* liable for a misrepresentation made by him in conjunction with other directors of a company formed under the *Companies Act*. His executors contended that the suit was in effect a proceeding to recover damages for a wrong done by Mr. *Gibbs*, and that the maxim *actio personalis moritur cum personâ* applied. But the plaintiffs failed in their case as against the executors of Mr. *Gibbs* on the express ground that Mr. *Gibbs*' estate had derived no benefit from the misrepresentation to which he was a party.

(1) 2 Russ. & My. 117. (2) 1 Cowp. 371. (3) Law Rep. 6 H. L. 377.

C. A. 1883 PHILLIPS v. HOMFRAY. Baggallay, L.J.

The general result of these cases, and of others to the like effect, may be thus stated, that a Court of Equity will give effect to a demand against the estate of a deceased person in respect of a wrongful act done by him, if the wrongful act has resulted in a benefit capable of being measured pecuniarily, and if the demand is of such a nature as can be properly entertained by the Court. The principles thus acted upon by Courts of Equity are in accordance with the conclusions enunciated by Lord *Mansfield* with reference to actions at common law which survive or die on account of the cause of action; but as regards those actions which at common law survive or die on account of the form of action, Courts of Equity will not permit the justice of the case to be defeated by reason of the technicalities of particular procedure. That the demand of the Plaintiffs in this suit was one proper to be made in a Court of Equity cannot be disputed; the decree is conclusive on this point. Upon the question whether the wrongful act resulted in a benefit to the estate of the wrongdoer I think the proper inquiry is that suggested by Sir *Thomas Plumer*, "Did the wrongdoer derive any benefit from the wrong done by him, or was it a naked injury by which his estate was in no way benefited?" My answer to that inquiry, as applied to the circumstances of the present case, is that the estate of the Defendant *R. Fothergill* was benefited by the wrongful user by the Defendants of the roads and passages under the Plaintiffs' farm. Indeed the decree, as varied by Lord *Hatherley* and as explained by him, appears to me to be conclusive on this point also. If the views which I have expressed are correct, it would follow that had no suit been instituted against the Defendant *R. Fothergill*, a suit to the like effect as regards the subject-matter of the second and third inquiries might have been commenced and prosecuted after his death against his executrix. Does the fact, that the suit was commenced against him and abated upon his death, make any difference? Can it be said that the suit survives as regards part of the relief prayed, but has died as regards the subject-matter of the second and third inquiries? I think not. The decision of Lord *Hardwicke* in *Garth* v. *Cotton* (1) was upon a bill of revivor against the representative of a defendant to the original bill, and

(1) 1 Dick. 215.

C. A. 1883 PHILLIPS v. HOMFRAY. Baggallay, L.J.

that in the case of the Marquis of *Lansdowne* was upon a demurrer to a supplemental bill filed against the representative of the Marquis, who was a defendant to the original bill.

For these reasons the appeal of Mrs. *Fothergill* ought, in my opinion, to be dismissed. I think, also, that the appeal of the Plaintiffs as regards the 4th inquiry fails, inasmuch as the wrongful acts which are the subject of it, though occasioning injury to the Plaintiffs, did not result in any profit to the wrong-doers.

Solicitors: *Field, Roscoe, & Co.; Ullithorne, Currey, & Villiers; T. W. Denby.*

H. C. J.

C. A. 1883 July 12, 13.

Ex parte BAGSTER. *In re* BAGSTER.

Liquidation Resolutions—Registration—Locus Standi to oppose—"Creditor"—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 125—*Bankruptcy Rules*, 1870, *rr.* 67, 70, 271, 295.

Upon the hearing of an application to register liquidation resolutions no one has a *locus standi* to be heard in opposition but a creditor who has previously proved a debt in the mode prescribed by the rules.

A person who claims to be a creditor, and in that character to oppose the registration, cannot prove his debt when he comes before the Registrar to oppose. If he has not previously proved a debt he cannot be heard.

THIS was an appeal from a decision of Mr. Registrar *Murray*, acting as Chief Judge in Bankruptcy.

Robert Bagster having filed a liquidation petition, the first meeting of the creditors was held on the 23rd of May, 1883, when resolutions in favour of a liquidation by arrangement were passed and a trustee was appointed. *B. B. Bagster*, who claimed to be a creditor, and whose name was inserted as such in the debtor's statement of affairs, was present at the meeting, but he did not prove his debt. The resolutions were carried in for registration, and *B. B. Bagster* gave notice to the debtor and to the Registrar of his intention to oppose the registration, stating in his notice various objections to the validity of the resolutions. When the application for registration came on to be heard by the Registrar *B. B. Bagster* claimed to be heard in opposition. He had not in

C. A. 1883 *Ex parte* BAGSTER. *In re* BAGSTER.

any way proved his debt, but he tendered an affidavit of proof to the Registrar. The Registrar held that the debt could not be proved then, and declined to receive the affidavit. And he held that as *B. B. Bagster* had not previously proved any debt in the manner prescribed by the General Rules, he had no *locus standi* to be heard in opposition to the registration. The Registrar accordingly declined to entertain the objections, and ordered the resolutions to be registered.

B. B. Bagster appealed.

Finlay Knight, for the Appellant :—

The Appellant was entitled to be heard before the Registrar. There is nothing in the Act or the Rules (1) which says that a creditor must have proved a debt before he can be heard in opposition to the registration of resolutions. He could have proved

(1) Sect. 125 (sub-s. 4) of the Act provides that "the special resolution, together with the statement of the assets and debts of the debtor, and the name of the trustee appointed, and of the members, if any, of the committee of inspection, shall be presented to the Registrar, and it shall be his duty to inquire whether such resolution has been passed in manner directed by this section, but if satisfied that it was so passed, and that a trustee has been appointed with or without a committee of inspection, he shall forthwith register the resolution and the statement of the assets and debts of the debtor, and such resolution and statement shall be open for inspection on the prescribed conditions, and the liquidation by arrangement shall be deemed to have commenced as from the date of the appointment of the trustee."

Rule 67: "A creditor may prove his debt at any duly summoned meeting of creditors, or at any time before the meeting, by delivering or sending through the post in a prepaid letter, before the appointment of a creditors' trustee, to the Registrar of the Court, and after the appointment of a creditors' trustee to such trustee, an affidavit according to the form in the schedule."

Rule 70: "A Registrar in his capacity of trustee may admit proofs, and upon sufficient cause shown, disallow any proof to which objection may be taken at the first or any other meeting of creditors."

Rule 271: "All proofs and proxies intended to be used at any general meeting, and not previously filed, shall be handed in to the chairman of the meeting. Any objection thereto shall be marked thereon by the chairman, and shall be dealt with by the Registrar on the resolution being presented to him for registration."

By rule 295: "Upon presentation of a special or extraordinary resolution for registration the Registrar shall examine the same, and may hear any creditor who shall have given him notice of his desire to be heard thereon."

his debt then when he was before the Registrar, and he offered to do so. *Ex parte Kirkwood* (1) is not a decision of the point; that case was heard and decided on its merits, and there are only *dicta* on the question of *locus standi*. An objection to a proof is in time if taken on the application for registration of resolutions: *Ex parte Weil* (2).

Seward Brice, for the debtor:—

The point was really decided in *Ex parte Kirkwood*, and that decision has been ever since acted on by the Registrars. The Appellant could have given notice to the trustee under rule 67.

[He was stopped by the Court.]

BRETT, M.R.:—

In this case resolutions having been passed by the creditors for a liquidation of the debtor's affairs by arrangement and the appointment of a trustee, a person, who for the present purpose I will assume was really a creditor, went before the Registrar to object to the registration of the resolutions, assuming to do so under rule 295. He had not proved any debt at the first meeting of the creditors, nor had he done so at all before he went before the Registrar. He had not sent any notice to the trustee, who, so far as the unregistered resolutions could have any operation, was the trustee appointed by the creditors. He asserted that he had a right before his objections to the registration were heard, and in order to enable him to be heard, then and there to prove his debt before the Registrar. I will assume that he could then have proved his debt, and that he did that which was equivalent to then and there offering to prove it, though I doubt whether any such offer was really made. I will assume, however, that he was in a position to prove his debt, and that he made the offer to do so. But then arises the question whether he had any right to insist on proving his debt at that time, at that place, and under those circumstances, and whether the Registrar was at liberty to listen to his proof then. And I am of opinion that at that time, at that place, and under those circumstances, the Registrar had no power to listen to such a proof, and, therefore, of

(1) 11 Ch. D. 724. (2) 5 Ch. D. 345.

C. A. 1883 *Ex parte* BAGSTER. *In re* BAGSTER. Brett, M.R.

course that the creditor had no right to present it. This depends on the construction of rule 295, as that construction is aided by the light thrown upon it by the other rules. Rule 295 says that upon presentation of the resolutions for registration the Registrar "may hear any creditor who shall have given him notice of his desire to be heard thereon." It is obvious that these words may include a creditor who has not proved his debt. It says "any creditor." But as was often stated by the late Lord Justice *James* (who understood this Bankruptcy Act and Rules, if not better than, certainly as well as any one else), and as was said by *Bacon*, C.J., in *Ex parte Kirkwood* (1), the Act and the Rules together form an elaborate and carefully-prepared scheme which enters into almost every step of the proceedings in bankruptcy. If, therefore, it had been intended that the Registrar should have power to hear a claim to prove a debt at the time and under the circumstances mentioned in rule 295, one would have expected to find a provision to that effect in the Rules. But there is no such provision. If it had been intended that the Registrar might at that time and and under those circumstances hear the claim of a creditor to prove a debt one would have expected to find it pointed out in the Rules how the creditor was to give notice of his claim, not only to the Registrar, but to other persons who might be interested in opposing his claim. But more than this, rule 67 does point out when and in what mode a creditor may prove his debt. That rule shews when and how debts are to be proved, and it certainly does not include this mode of proof before the Registrar when he is called upon to register resolutions. Looking at rule 295 with the light thrown upon it by rule 67, it seems to me that it would be wrong to say that under rule 295 the Registrar has power to hear and determine upon a claim to prove when it is brought before him at the time and in the way which is suggested. It appears to me that looking at all the rules together, the true construction is this,—that debts must be proved at a meeting of the creditors, or if not proved then, they must be proved in one of the other ways mentioned in rule 67, and that they cannot be proved at any other time or in any other way. It seems to me that the Registrar when he is sitting to hear

(1) 11 Ch. D. 727.

an application to register resolutions is not a mere ministerial officer, but he is the Court, and that the Court is authorized to hear and determine upon a proof only when it is a disputed matter. The Registrar had no authority to hear the Appellant by himself, it being impossible under the Rules that he could have given notice to any one to come and object to his proof at that time and at that place. Not only had he not given any such notice, but he could not under the Rules have done so. This case, therefore, is not within rule 295; the Appellant was not entitled to prove his debt at that time, and the Registrar could not receive his proof, and he was not, within the meaning of rule 295, a creditor who could be heard in opposition to the registration. I think this is what *Bacon*, C.J., meant to decide in *Ex parte Kirkwood* (1). He considered that the appellant *Kirkwood* had no *locus standi*, that he was not a creditor who could object to the registration of resolutions, because he had withdrawn his proof. I cannot say with the Chief Judge that "the Rules are very clear and distinct," though I agree with him that "the scheme is most carefully prepared and expressed in the Rules." I think the Chief Judge intended to say that the Appellant in that case could not give a proper notice to the Registrar of his desire to be heard on the question of the registration of the resolutions, because he was not a creditor who had previously proved a debt. And I cannot help thinking that when *James*, L.J., said (2): "It is not necessary for us to consider the second point, upon which, however, as at present advised, I am quite clear. It would require a great deal of argument to satisfy me that the Chief Judge was not right upon that point" (that is, that the creditor had no *locus standi*, because he had not proved a debt)—I cannot help thinking that *James*, L.J., meant that he had a clear opinion that the Chief Judge was right, because the creditor had not proved a debt, and could not prove it before the Registrar on the hearing of the application to register the resolutions. We are told that this interpretation of *Ex parte Kirkwood* has ever since been acted upon by all the Registrars in bankruptcy, and this fortifies me in my view that that was the intention of *James*, L.J. Though that expression of his opinion is not actually binding on the Court, yet, with the

(1) 11 Ch. D. 724.

(2) 11 Ch. D. 729.

C. A. 1883 *Ex parte* BAGSTER. *In re* BAGSTER.

deference which I should always give to his opinion, I say that it is also my opinion, and I think the Registrar was right in the present case in holding that the Appellant had no *locus standi*.

COTTON, L.J.:—

The question turns upon the construction of sect. 125 of the *Bankruptcy Act*, 1869, and the Rules of 1870. Now, in sub-sect. 4 of sect. 125, nothing is said about creditors appearing and objecting to the registration of resolutions. But rule 295 provides that the Registrar "may hear any creditor who shall have given him notice of his desire to be heard thereon." It does not say, "any creditor who has proved a debt," but I think that is the fair meaning—a person who has established his position in the liquidation as a creditor. Then the question is, had the Appellant a right to prove his debt then and there? I am not sure (though it is not necessary to decide this) whether he ought not to have proved his debt before he gave notice to the Registrar of his desire to be heard on the application for registration. But, assuming that it was only necessary that he should have proved his debt before he could be heard in opposition to the registration, was the Registrar right in holding that he could not prove his debt then? To answer this question we must look principally at rule 67. I think that rule clearly points to this, that before a person has a right to appear as a creditor in the liquidation his proof of debt must have been before a meeting of creditors, *i.e.* the meeting at which he is admitted to prove. Another objection which appears to me to be fatal to the Appellant's claim is that after the appointment of a creditors' trustee the affidavit of proof is to be sent to him, and though in the present case the resolutions had not been registered, yet a trustee had been appointed by the creditors. Rule 70 provides that the Registrar in his capacity of trustee may admit proofs, but that capacity is at end when a creditors' trustee is appointed. Then again, rule 271 provides that "all proofs and proxies intended to be used at any general meeting, and not previously filed, shall be handed in to the chairman of the meeting. Any objection thereto shall be marked thereon by the chairman,

and shall be dealt with by the Registrar on the resolutions being presented to him for registration." The Registrar is to deal with objections to proofs which have been already made, but there is nothing to shew that he is to deal with proofs then tendered for the first time. Looking at the Rules altogether (though I felt some doubt at first, because I think it is very desirable that every creditor should have an opportunity of objecting to the registration of resolutions), I am of opinion that the practice laid down by the Rules has been followed by the Registrar in the present case. I wish to add, that I think we must come to the conclusion that in *Ex parte Kirkwood* (1), *Bacon*, C.J., intended to decide that the creditor could not be heard to object to the registration, not only because he had not given notice of his objection, but because he could not have proved his debt before the Registrar on that occasion. If that is so, we have not only the authority of the Chief Judge in favour of this view, but we have the very strong expression of opinion of *James*, L.J. In my opinion the Registrar's decision was right.

BOWEN, L.J.:—

I am of the same opinion. Rule 295 contains a provision that creditors who have a right to be heard in opposition to the registration of resolutions shall be heard, and I think that any creditor who has complied with the conditions of the rule has a right to be heard. It is clear that the Registrar cannot assume that a man is a creditor simply because he says he is; there must be some proof of a debt. Can then a creditor prove his debt then and there on the hearing of the application to register the resolutions? It seems to me that a proof of debt can only be made according to the rules, and that until a creditor has proved his debt according to the provisions of the Rules he has not proved at all. There is a great deal of business advantage in requiring that proofs of debt should be made in the prescribed manner, for otherwise a man would go down at the last moment to prove his debt, without the Registrar having any means of knowing what might be the objections to it, and thus the claimant would escape all the provisions of the Rules which enable

(1) 11 Ch. D. 724.

C. A. 1883 *Ex parte* BAGSTER. *In re* BAGSTER. Bowen, L.J.

objections to be made to proofs. If the appointment of the trustee dated from the passing of the resolutions, the proof ought, after his appointment, to have been sent to him, and then the Appellant is clearly out of Court. If, on the other hand, the Registrar was trustee until the registration of the resolutions appointing a trustee, had the Appellant's proof been tendered to him in the prescribed way? That depends upon the construction of rule 67, and the other rules on the subject of proof. There is a difference between the Registrar and a trustee appointed by the creditors, and the intention of rule 67 seems to be that, until the appointment of a creditors' trustee, all proofs shall be brought before a meeting of creditors, and rule 70 appears to confirm this view. I think the language used by the Chief Judge in *Ex parte Kirkwood* (1) clearly shews that he thought this was the true construction of the rules, when he says that in rule 273 the words "proving his debt on any subsequent occasion," mean "an occasion on which debts can be proved; a meeting such as the statute prescribes." You cannot prove a debt before the Registrar by simply walking down to his office, and asking to be heard, without there being any opportunity for any of the other persons interested to object to the proof. This is the view which has been taken by all the Registrars ever since *Ex parte Kirkwood* was decided; it is the most business-like view, and it can do no possible harm to any one. In either view of the position of the Registrar—whether he was trustee or not—the appeal equally fails, and must be dismissed.

Solicitors: *Hogan & Hughes*, agents for *Miller & J. J. Corbet, Kidderminster; Denton, Hall, & Burgin.*

(1) 11 Ch. D. 724.

W. L. C.

In re KEMP'S SETTLED ESTATES.

C. A. 1883 Aug. 8.

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 38—*Appointment of Trustees—Solicitor for the Tenant for Life.*

A testator devised his real estate to the use of *G.* and *W.* in fee upon trusts in strict settlement, and bequeathed to them his residuary personal estate upon trust to invest it in the purchase of land to be conveyed to them upon the same trusts. The will contained no power of sale. *W.* was the family solicitor, a person of good position and high character, and after the death of the testator he acted as solicitor to the trustees and also to the tenant for life. The tenant for life being desirous of selling part of the estates under the powers of the *Settled Land Act*, applied to the Court to appoint *G.* and *W.* trustees for the purposes of the Act:—

Held (affirming the decision of *Kay*, J.), that *W.* ought not to be appointed, for that although he was in all other respects a most proper person, his being solicitor to the tenant for life, made him unsuitable for an office the duties of which required him to check the proceedings of the tenant for life.

SIR *W. R. KEMP*, by will, dated the 10th of April, 1861, appointed *C. E. Gibbs*, Esq., the Rev. *T. C. Kemp*, and *John Richard Wood*, gentleman, to be trustees and executors, and bequeathed to them his residuary personal estate upon trust, after payment of debts, funeral and testamentary expenses and legacies, to invest it in the purchase of real estates to be conveyed to the use of the above trustees in fee upon the trusts thereinafter declared concerning his residuary real estate, and in the meantime to invest it in such stocks, funds and securities as therein mentioned, and accumulate the income and add it to the capital, and hold the accumulations on the same trust for investment in real estate. The testator devised his real estate unto and to the use of his trustees in fee upon trust, until there should be a tenant for life or tenant in tail in possession of full age, to invest the net rents in the purchase of real estate to be conveyed to them on the trusts of his real estate, with a direction for interim investment and accumulation, and, subject as aforesaid, upon trust for the testator's eldest son for life, and after his

C. A. 1883 *In re* KEMP'S SETTLED ESTATES.

decease upon trust for the first and other sons of such eldest son successively in tail male, with divers remainders over. The will contained provisions for raising portions for the testator's younger children, and gave powers of jointuring and charging portions to the tenants for life. It also contained powers of leasing, and a power exercisable by the trustees, with the consent of any tenant for life in possession, if of full age, and during the minority of any tenant for life in possession, or tenant in tail in possession, at their own discretion, to enfranchise copyholds; but it did not contain any power of sale. Mr. *Wood*, who was a solicitor, was authorized to make professional charges.

The testator died on the 29th of May, 1874.

Mr. *Wood*, the trustee, was the family solicitor, and had been such for many years. He was now the solicitor both of the trustees and of the tenant for life, Sir *Kenneth Hagar Kemp*.

Sir *K. H. Kemp*, being desirous of selling part of the settled estates under the powers of the *Settled Land Act*, 1882, applied to Mr. Justice *Kay* in chambers, under sect. 38 of the Act, to appoint Mr. *Gibbs* and Mr. *Wood*, the surviving trustees of the will, to be trustees for the purposes of the Act. Mr. Justice *Kay* refused the application, on the ground that Mr. *Wood* being solicitor for the tenant for life ought not to be appointed, although in all other respects he appeared to be a fit and proper person.

The tenant for life appealed.

Robinson, Q.C., and *Bramley*, for the appeal:—

The principles on which the Court acts in appointing new trustees are shewn in *In re Tempest* (1). The Court will have regard to the wishes of the author of the trust, and will act so as to facilitate its execution. Here the personal estate is vested in the trustees of the will upon trust to invest it in the purchase of real estate to be settled on the trusts of the will. The real estate is vested in them, and they have a power of enfranchising copyholds, which is very similar to a power of sale. It is clear that if the testator had contemplated a sale he would have given the

(1) Law Rep. 1 Ch. 485.

power of selling to these trustees, and it would be most inconvenient to have another set of trustees to receive the purchase-money and invest it in lands to be conveyed to the present trustees. *Forster* v. *Abraham* (1) shews that a tenant for life may be appointed a trustee with a power of sale, and, *à fortiori*, the fact that a person trusted by the testator and invested with important powers, acts as solicitor for the tenant for life, does not disqualify him.

[COTTON, L.J.:—That case only decides that the appointment of a tenant for life under a power was not invalid, it does not decide that the Court would have appointed him.]

Woodhouse, for the trustees, supported the application.

COTTON, L.J.:—

This is an appeal from a refusal by Mr. Justice *Kay* to appoint Mr. *Wood* a trustee under sect. 38 of the *Settled Land Act*. Before selling under the Act, the tenant for life must serve notice of his intention on the trustees, and if there are no trustees within the meaning of the Act, the Court has power to appoint them. The two trustees of the will were proposed as trustees. Mr. Justice *Kay* had no objection to appointing Mr. *Gibbs*, but declined to appoint Mr. *Wood*. The gentleman is no doubt a most fit person to be a trustee, and the only objection to him is that he acts as solicitor for the tenant for life. Now the appointment of trustees is required to impose a check upon the extensive powers conferred by the Act upon the tenant for life, and the 44th section contemplates the probability of there being differences between the trustees and the tenant for life. I have no doubt that Mr. *Wood*, as solicitor of the tenant for life, would advise him to the best of his ability, and recommend him to exercise his powers with a proper regard to the interests of the remaindermen. But solicitors, like Judges, are fallible, and how could Mr. *Wood*, as one of the trustees, exercise a proper judgment on their behalf upon questions on which he had advised

(1) Law Rep. 17 Eq. 351.

C. A. 1883 *In re* KEMP'S SETTLED ESTATES. Cotton, L.J.

the tenant for life? It would be Mr. *Wood* as trustee putting a check upon Mr. *Wood* as solicitor to the tenant for life, and he would be placed in a false position. It is said that the testator made him a trustee. I asked during the argument whether there was anything in the will in respect of which it was the duty of the trustees to act as a check upon the tenant for life, and I could not learn that there was. Therefore, though the will shews that the testator put confidence in Mr. *Wood*, it does not lead to the inference that he would have put him into a position in which it would be his duty to check the tenant for life. I am of opinion, therefore, without the slightest imputation on Mr. *Wood*, that Mr. Justice *Kay* exercised a sound discretion in declining to appoint him as one of the trustees.

BRETT, M.R., and BOWEN, L.J., concurred.

Solicitors: *Wainwright & Baillie.*

H. C. J.

C. A. 1883 *Aug.* 7.

In re MANCHESTER ECONOMIC BUILDING SOCIETY.

Practice—Appeal—Extension of Time for Appeal—Special Grounds—Company—Order on Winding-up Petition—Rules of Supreme Court, 1875, *Order* LVIII., *r.* 15—*Lancaster Court—Power of Rehearing—Transfer of Shares to escape Liability.*

The shareholders in a company passed an extraordinary resolution to wind up the company voluntarily, but the resolution was void, the majority of members who voted not being entitled to vote. A creditor filed a petition in the Chancery Court of the Duchy of *Lancaster* for a supervision order or for a compulsory winding-up order, and as the Court and the Petitioner were ignorant of the fact that the resolution was invalid, a supervision order was made. Five months afterwards the Petitioner discovered the invalidity of the resolution, and then moved before the Vice-Chancellor that the supervision order might be discharged, and a compulsory winding-up order made. This motion having been refused by the Vice-Chancellor on the ground of want of jurisdiction to rehear the petition, the Petitioner appealed from the refusal of the motion, and also applied to the Court of Appeal for leave to appeal against the original order notwithstanding the lapse of time.

The application for leave to appeal was opposed by the executors of a

previous member, who had transferred their testator's shares to escape liability less than twelve months before the presenting of the original petition, but more than twelve months before the case came before the Court of Appeal, on the ground that if an order were now made on the original petition they would be made liable under the 38th section of the *Companies Act*, 1862 :—

Held, that leave to appeal, notwithstanding the lapse of time, ought to be given, the mistake as to the validity of the resolution forming a special ground for the application, and the respondents having no equity to resist it.

Observations on the principle on which the Court grants extension of time for appeal.

In re New Callao (1) approved.

Semble, the Vice-Chancellor had no power to rehear the petition himself.

THE *Manchester Economic Building Society* was incorporated on the 17th of August, 1874. It was an unlimited company with a nominal capital of £20,000, divided into 4000 shares of £5 each.

Only nine persons took shares, and the company was not successful.

William Mather, who was a registered shareholder of 100 shares, having died, his executors, on the 8th of November, 1881, transferred his shares in order to escape liability, and the transfer was registered on the 7th of December, 1881.

In the month of October, 1882, all the other shareholders except one, who was a liquidating debtor, transferred their shares to clerks and other nominees, who were persons of no means, for the purpose of escaping liability. These transfers were registered on the 31st of October, 1882.

On the 10th of November, 1882, an extraordinary meeting of the shareholders was held, the only members present personally or by proxy being those to whom the shares had been recently transferred; but Mr. *Heywood* and Mr. *A. Fox*, two of the retiring members, attended as directors, though not as shareholders. At this meeting a resolution was passed for winding up the company voluntarily.

On the 29th of November, 1882, a petition was presented by Mr. *Rowbotham*, a creditor, stating that the company was insolvent, and praying that the voluntary winding-up might be continued under the supervision of the Court, or else that the company

(1) 22 Ch. D. 484.

C. A. 1883 — *In re* MANCHESTER ECONOMIC BUILDING SOCIETY.

might be wound up compulsorily from the date of the extraordinary resolutions.

The petition was heard on the 18th of December, 1882, before Mr. *H. F. Bristowe*, the Vice-Chancellor of the Duchy of *Lancaster*, when the Petitioner elected to ask for a supervision order, and His Honour accordingly made an order, continuing the voluntary winding-up under supervision.

At that time the Petitioner had no knowledge of the circumstances under which the resolution was passed, and supposed it to be valid; although the gentleman who afterwards acted as his solicitor was present at the meeting, but not acting on his behalf.

The debts of the company exceeded the assets by about £29,000, and the present members of the company were persons of no pecuniary means. It was therefore necessary to call upon the past members.

In March, 1883, the liquidators carried in a claim for £5000 in an action which had been brought for the administration of the estate of *W. Mather* for calls which they had made on his estate in the winding-up. The executors disputed the validity of the winding-up on the ground that the majority of the shareholders who had attended the meeting and voted for the resolution had not been registered as shareholders for the period of three months required by the 47th rule of Table A of the *Companies Act*, by which the company was governed, and therefore were not entitled to vote.

On discovering the invalidity of the voluntary winding-up, Mr. *Rowbotham* and some of the other creditors moved before the Vice-Chancellor that the supervision order of the 18th of December, 1882, might be discharged, and that a compulsory order for winding up the company might be made as from the date of the winding-up petition. The motion was heard on the 23rd of May, 1883, when His Honour, on the authority of *In re St. Nazaire Company* (1), was of opinion that he had no power to rehear the petition.

The creditors appealed from this decision, and at the same time applied to the Court of Appeal for liberty to appeal from

(1) 12 Ch. D. 88.

the order of the 18th of December, 1882, notwithstanding that the time limited for appealing had expired.

C. A. 1883 *In re* MANCHESTER ECONOMIC BUILDING SOCIETY.

Higgins, Q.C., and *Chadwyck Healey*, for the Appellants:—

The Vice-Chancellor had jurisdiction to make a compulsory winding-up order, notwithstanding the previous order. The previous order was a nullity: it was impossible to be carried into effect, for there was no voluntary winding-up which could be carried on under supervision. And even if the order was not actually a nullity the Vice-Chancellor had power to rectify it, as it was made under a mistake: *In re Shields Marine Insurance Company* (1); *Buckley* on Joint Stock Companies (2). The Vice-Chancellor considered himself bound by *In re St. Nazaire Company* (3), but that case is distinguishable. The Judges in the Chancery Courts had always exercised the power of rehearing their own decisions if there had been a slip, or if they had been deceived as to the facts, and this power has not been taken away by the *Judicature Act*. Under a supervision order the creditors have always liberty to apply to the Court, and the Court may on their application supersede the voluntary winding-up by a compulsory order without an appeal: *Fritz* v. *Hobson* (4); *In re London and Mediterranean Bank* (5); *In re Patent Floor Cloth Company* (6); *Companies Act*, 1862, ss. 83, 145, 147, 152.

But assuming that the Vice-Chancellor had no jurisdiction to rectify or rehear the petition, we ask for an extension of time for appealing against the supervision order, that the erroneous order may be discharged and a compulsory order for winding-up now made as from the date of the original petition.

The case is governed by the 15th rule of Order LVIII., which is applicable to proceedings in the Palatine Court. We are therefore too late, unless the Court extends the time. This is peculiarly a case in which such an extension ought to be permitted, for the order was made entirely by mistake without any fault on our part, and its invalidity has been only recently

(1) W. N. 1867, p. 296.
(2) 4th Ed. p. 223.
(3) 12 Ch. D. 88.
(4) 14 Ch. D. 542.
(5) 15 W. R. 33.
(6) Law Rep. 8 Eq. 664.

C. A. 1883 — *In re* MANCHESTER ECONOMIC BUILDING SOCIETY.

discovered: *In re Padstow Total Loss and Collision Assurance Association* (1); *Ex parte Tucker* (2); *In re Estates Investment Company* (3).

If the Court should give leave to appeal it will be convenient to hear the appeal at once, and make the order for winding-up without further delay.

Method, for the company, supported the appeal.

Lake and *Buckley*, for the executors of *Mather*, were called upon only on the question of extending the time for appeal:—

The rule under the *Judicature Act* makes it clear that some special ground must be shewn raising an equity on the part of the Appellant, and so it has been interpreted by the Court.

When the three weeks have elapsed the successful party has obtained a right of which he ought not to be deprived unless he has lost it by his own conduct or some extraordinary accident. In the present case the matter stands thus: The voluntary winding-up and the supervision order having come to nothing no winding-up order can be made unless a new petition be presented, and in that case more than a year will have elapsed since the transfer of the shares by *Mather's* executors, and they will be freed from liability under the 38th section of the *Companies Act*, 1862. But if the Court grants leave to appeal, notwithstanding the lapse of time, a winding-up order may be made on the old petition, and it will date from the presentation of the petition, in which case the executors will be liable as past members. Therefore the executors will be deprived of the right which they have acquired under the order made by the Vice-Chancellor: *McAndrew* v. *Barker* (4); *In re Mansel* (5); *Curtis* v. *Sheffield* (6); *Doyle* v. *Kaufman* (7); *Ex parte Geisel* (8); *In re Milan Tramways Company* (9); *In re Blyth and Young* (10); *In re New Callao* (11).

(1) 20 Ch. D. 137.
(2) 12 Ch. D. 308.
(3) Law Rep. 8 Eq. 227.
(4) 7 Ch. D. 701.
(5) Ibid. 711.
(6) 21 Ch. D. 1.
(7) 3 Q. B. D. 340.
(8) 22 Ch. D. 436.
(9) 22 Ch. D. 122.
(10) 13 Ch. D. 416.
(11) 22 Ch. D. 484.

[BRETT, M.R., referred to *Carter* v. *Stubbs* (1).]

The executors had a perfect right to get rid of their liability by transferring their shares. As executors it was their duty to do so, in the same way as it is the duty of executors to transfer a lease which has onerous covenants. The creditors are not injured by the transfers, for the company being one of unlimited liability they can come upon the other shareholders.

The Petitioner, although he might be personally ignorant of the facts when the petition was presented, had constructive notice of them, for his solicitor was present at the meeting, and he was well acquainted with what had taken place.

Clare, for the trustee in liquidation of the shareholder who had not transferred his shares:—

I may also be prejudiced if leave to appeal is given. For I have been administering the assets of the shareholder on the footing of the resolutions for winding up being a nullity, and if a winding-up order should be now made on the old petition it may invalidate some of the payments which I have made.

BRETT, M.R.:—

In this case there were nine shareholders in a company. The company was in debt to the extent of absolute insolvency, upon which eight of those shareholders transferred their shares to clerks—poverty-stricken people and mere nominees. Thereupon those nominees, being the company, hold a meeting, and they pass a resolution to voluntarily wind up the company, which would have been a winding-up then of a company with eight paupers in it and a large body of creditors. Thereupon one of the creditors, not knowing or having the means of knowing of this manipulation of the company, obtains information, which was the only information he could obtain, that the shareholders had passed an extraordinary resolution to wind up the company voluntarily. Upon that, not having knowledge or the means of knowledge of what had really happened, but taking it that the matters had been carried on with ordinary business-

(1) 6 Q. B. D. 116.

C. A. 1883 ~~ *In re* MANCHESTER ECONOMIC BUILDING SOCIETY. —— Brett, M.R. ——

like honesty, he presents a petition in the usual form to the Court, which states that which of course he believed to be true—because he had no means of knowing it was not true—that there had been an extraordinary resolution by shareholders to wind up the company; and he petitions that the voluntary winding-up may be continued under supervision, or in the alternative for a compulsory winding-up. It is brought before the Court and the Court is not informed of this manipulation which had taken place in the company; the Court is not informed that this extraordinary resolution, by reason of this manipulation, is wholly invalid. Nobody informs the Court of that; therefore, neither the Petitioner nor the Court knowing of what had taken place within the interior of this company, almost as a matter of course, the Petitioner, assuming that things had been done, as I say, with business-like honesty, agrees that the Court should make the order for a voluntary winding-up. That order is made, and nothing is disclosed; nothing is said, but the thing goes on until, if a new petition is presented for a winding-up, these transfers, made in the way and for the purpose that I have related, will have been more than a year in existence, and the result will be that the company will stand in the winding-up just as the parties who transferred their shares originally intended it should be on the winding-up, namely, that the winding-up should consist of the creditors, and the present shareholders, who are all paupers. But if the Court had been informed of what had taken place within the company, or if the Petitioner had been informed of what had taken place within the company, both the Court and the Petitioner would have known that the resolution was an invalid resolution, and the inevitable result must have been that at the time when the petition was before the Court, the order would have been for a compulsory winding-up. That must be clear to everybody.

Well, upon the real state of things being discovered by the Petitioner, more than a year after these transfers, the Petitioner goes to the Vice-Chancellor who has made the order, and requests him to review his decision and to alter that order, which was an order for a voluntary winding-up, into an order for a compulsory

winding-up, and that upon the old petition. Now, the point taken here is this, that the original order was a nullity, and that whether it was or not the Vice-Chancellor himself could hear it and could alter the order. On the other side, it is said that, under the Rules and Orders of the *Judicature Act*, which are applicable to the County Palatine Court of Chancery just as much as here, the order for a voluntary winding-up, being an order which upon right materials the Vice-Chancellor might have made, of which there is no doubt, it is impossible to say that he had not jurisdiction. If it was, as I venture to think it was, an erroneous decision, they say that an erroneous decision can only be set right by an appeal under the Judicature Act and the Rules of the Supreme Court. It is urged in answer to that, that these Rules have not altered the former practice of the Court of Chancery, and that a judge of the Chancery Division can re-hear, so as to alter a former decision of his own which is shewn to be erroneous, upon a subsequent hearing, although a judge of the Queen's Bench Division, if he hears a case without a jury and decides it, cannot rehear it for the purpose of deciding that he came to a conclusion which was erroneous. It is not necessary in this case to give a judgment which shall be a binding judgment of the Court of Appeal upon that point; and, therefore, I do not propose for my part to give that judgment, although I do think the form in which I have put the proposition must shew that I refrain from doing so not because I have not an opinion on the matter, but because it is not necessary to formulate that opinion as a judgment.

But then there arises another question, which is this: Even supposing that the Vice-Chancellor might have reheard this, nevertheless it is also a subject-matter for appeal; and inasmuch as he clearly had jurisdiction to make either order, and the allegation is that he made an erroneous order in consequence of the materials before him, I cannot doubt that an appeal lies. Then comes the question, within what time does that appeal lie? Now the time within which the appeal lies seems to me to be a question to be decided by the *Judicature Act* and by the Rules of the Supreme Court. There is another limitation of time which has

C. A. 1883 *In re* MANCHESTER ECONOMIC BUILDING SOCIETY. Brett, M.R.

been mentioned here which would have been applicable if the circumstances had given rise to it with regard to that petition at the time it was heard, namely, if these transfers had been made more than a year before that petition then sect. 38 of the *Companies Act* of 1862 would have been applicable; but that section does not seem to me to apply to the question of the time within which an appeal from the order of the Vice-Chancellor ought to be made. That time is determined by the *Judicature Act*. It is perfectly clear that that time has passed. The first question therefore, and the main question—because everything else follows from it in this case—is, whether this Court ought under the circumstances of this case to enlarge the time of appealing. The power of the Court to enlarge the time of appealing to this Court of Appeal is given entirely by the 15th rule of Order LVIII. There is the order, which is a statutable order now, and which gives this Court authority to extend the time of appealing. That rule is: "No appeal from any interlocutory order shall, except by special leave of the Court of Appeal" (which shews that the Court of Appeal may do it by giving special leave) "be brought after the expiration of twenty-one days, and no other appeal shall, except by such leave, be brought after the expiration of one year." That rule implies and enacts in my opinion clearly that in the case of interlocutory appeals, although the time of appealing, according to the other rules, has passed, and although therefore without the special leave of the Court of Appeal, the party against whom the appeal would have to be entered has a right to intervene, nevertheless the appeal may be made by special leave, dealing with that right which he otherwise has. In other words it is only a right subject to the special leave of the Court of Appeal. And so in the other case, even after a year the party has a right to say that no appeal can be brought against him except by special leave of the Court of Appeal. Therefore we have a right which in some sense has a limitation; it is "subject to the special leave of the Court of Appeal."

Now it has been attempted to define and circumscribe and lay down in other words than are laid down in the rule, the jurisdiction and duties of the Court of Appeal; and certain cases have

been cited in which learned Judges have used expressions with regard to the particular facts before them, which if they were taken to be the law laid down as to all cases, would alter the effect of and would introduce words into the 15th rule. I object absolutely to alter the words of, or to introduce words into, the 15th rule. That rule must stand as it was written; it must stand as it was adopted by Parliament; and what the Court has in each case to do is to see whether there are grounds for the Court to give the special leave; and I know of no rule other than this, that the Court has power to give the special leave, and exercising its judicial discretion is bound to give the special leave, if justice requires that that leave should be given. The cases which were brought before the Court were cases in which either justice did require that the leave should be given or justice required that it should not be given. But those are instances of the application of the rule; they cannot alter the rule and they cannot alter the phraseology of the rule; and although some Judges with regard to the particular cases before them have used expressions which have been relied on, yet other Judges when they came to see what was the effect attributed to those expressions have at once pointed out that they were expressions used with regard to the particular case before them, and that they were not to be taken as substituting anything for the words of the 15th rule. My brother *Cotton*, when certain expressions of the late Master of the Rolls were brought to his attention, at once pointed out that those expressions could not be applicable in all cases, and, as he says, shewed to the Master of the Rolls himself that the expressions which he had used were too drastic, and that the rule must be more elastic. And in another case, which was heard when Lord *Selborne* was present in the Court of Appeal, he again pointed out not only that those expressions which had been used were not sufficiently elastic, but he added this, that it is the most unsafe thing for the Court to use any expressions other than the expressions which are in the rule, because it is impossible for anybody who attempts to alter the wording of that rule by other interpretative words to foresee all the cases which might arise. I will defy anybody to foresee such a case as that which has arisen

C. A. 1883 *In re* MANCHESTER ECONOMIC BUILDING SOCIETY. Brett, M.R.

now before us, where you have this series of transactions—that which is said to be a legal transfer, and which is in law a sufficient transfer, but which as a matter of honest business to my mind is wholly unjustifiable—this transfer to paupers in order to escape the payment of debts which have been incurred in your time. That of itself would not do, but then you have that which was the very natural result of what was then done, namely, a simulated and illegal resolution to wind up the company in a particular way, and then that not disclosed but lying dormant until by lapse of time, by the Court having improvidently, because of want of knowledge, and the Petitioner having improvidently, because of want of knowledge, allowed the particular order of the Court to go, and then the delay until the time of appeal is out; and then we have it said that because the time of appeal is out that wrong order so obtained cannot be set aside—I say it is impossible for anybody to foresee that, and to foresee the enormous injustice which would be done in this case if that order were to stand, while no injustice is done to anybody if the order is made what it ought to have been, not even in the one case which was brought before us as an exception. Therefore as the making of the order now which ought to have been made then does no injustice to anybody, it seems to me that this is a case precisely within the terms of the 15th rule, and is a case in which the Court ought to give special leave to appeal.

If special leave to appeal is given the result is inevitable, that this Court must now make the order for winding up this company which ought to have been made by the Vice-Chancellor, and which he would assuredly have made at the time that the petition was before him if the facts of the case had not been kept back from him.

COTTON, L.J.:—

In this case an order was made by the Vice-Chancellor in the County Palatine Court, which was a supervision order. That was made upon a petition presented by a creditor, who represented to the Court that there was a case for making that form of order.

On that petition undoubtedly a compulsory winding-up order

might have been made. Now it turns out in fact that the order was void; the order was not a nullity, but it was one which could not be in any way worked, on this ground, that there was no good resolution for the winding-up; that is to say, that the resolution which had been passed to wind up the company voluntarily had not been passed in such a way as to make it a good resolution having regard to the articles of association. Therefore the winding-up under that supervision order comes to a deadlock—nothing can be done under it. Then more than three weeks have elapsed since that order was made, and the question is, whether the order should now be altered—whether it ought to be altered by the Vice-Chancellor, or whether we should give leave to rehear or to appeal against that order, and make the order which ought to have been made by the Vice-Chancellor. I do not intend in any way to deal with the question whether under the *Judicature Act* there would have been jurisdiction in the Vice-Chancellor to rehear that petition. I will deal with it simply as on appeal. Undoubtedly on appeal, subject to the objection of time, or the bar of time, this Court can make the order which the Judge below, if the evidence had been properly brought before him, ought to have made. This, I think, may be laid down, that when the Rules and the Act of Parliament say that an appeal is to be within a certain time unless special leave shall be given by the Court of Appeal to appeal after that time, the Court does not grant leave unless there is something which in the opinion of the Court entitles the person who applies for extension of time to be relieved against the bar established by the Orders and the Act of Parliament. It has been called an equity, but that is not a proper term; it is something which entitles him to ask for the indulgence of the Court, to ask to be relieved from the legal bar that there is in the Orders and Act of Parliament. But it is contended by the Respondents that it must be an equity arising from the conduct of the respondent who is opposing the application. That, in my opinion, is erroneous. There were certain observations of the late Master of the Rolls to support that view, that the person who insisted upon the time is entitled to say, "I have done nothing which raises an equity against me, and therefore you are

C. A. 1883 *In re* MANCHESTER ECONOMIC BUILDING SOCIETY. Cotton, L.J.

not to be relieved." That, I think, was almost abandoned in argument, and I should not have referred to it except that it is unfortunate that misapprehensions should exist as to that point; for in the case of *In re New Callao* (1) the Master of the Rolls concurred in the expression of opinion which I then stated, and which Lord Justice *James* had already stated in another case, that in order that the appellant might be relieved from lapse of time it was not necessary to shew that there was something in the conduct of the respondent which entitled the appellant to be relieved; it was sufficient if he satisfied the Court that there was something either in the acts of the respondent or from other circumstances which entitled him to be relieved, and to be allowed to appeal notwithstanding the time had lapsed.

Now what is this case? I will deal with it at first independently of those who appear here and oppose. The petition was presented against the company and the company appeared. The shareholders and creditors had a right to appear and to support or oppose; and although as between parties whose rights are settled by the terms of the order made and by the decision of the point arising upon the hearing, the Court has been very strict in not relieving parties from the bar of time which exists under the Orders, and allowing them leave to appeal, yet I doubt whether any such principle will apply to a case like the present, where it is not so much a case as between those who are served with the petition and the Petitioner, but is a question affecting the rights of those who are to come in under the liquidation which is ordered by the petition. Here, undoubtedly, there was a case for winding up this company. The only question was how that winding-up should be conducted, and what happened was this, that the company who were the Respondents had put forward what I will call an apparent resolution for winding up voluntarily when in fact no resolution had been passed which could authorize a voluntary winding-up of the company, because it was passed by persons who had no right to vote, and therefore that resolution was a nullity, and in consequence of that, of which the Petitioner was ignorant though the company knew it, the order was taken in the form

(1) 22 Ch. D. 484, 492.

which I have mentioned of a supervision order instead of a compulsory order. If the only persons to be considered were the parties to that petition, in my opinion there would be no doubt that if the Petitioner had applied to the Court in a reasonable time after he had discovered the mistake which had misled him and the Court, he would have been entitled, notwithstanding the time for appealing had elapsed, to be relieved from the bar of time and to have had the petition heard on appeal by this Court in order that what would have been the proper order if the facts had been known should be made. But, then, it is said that here two Respondents object and say that their rights come in, and that they ought to be allowed to insist on the bar of time. I will deal first with the executors of *Mather*. They have transferred their shares within a year before the petition was presented on which this order, not a nullity but an inoperative order, was made, whereas if a new petition were presented and the old petition not heard, then under the 38th section of the Act of 1862 they could not be made in any way liable, because although liable as past members they could not be made so if they had parted with the shares of the testator more than a year before the commencement of the winding-up. I am not at all satisfied that if there was nothing else in the case they would be entitled to say that their rights are not to be affected, even if as against the company the Court thinks it right to relieve the Petitioner from the bar of time; but I cannot disregard the circumstances under which they became past members, or rather, made the estate of their testator entitled to the benefit of that transaction—the transfer of the shares. What is stated on the affidavit of their solicitor is this, that apprehending liability, and in order to be relieved from liability, they transferred the shares of their testator to a person of no means, paying him a small sum of money to accept the liability. Therefore they were persons who tried to escape from liability—I will not use the word "evade," but to escape from liability by taking advantage of the power which is given to the shareholders to transfer under the provisions of the section of the Act of 1862 their liability for debts contracted while they were members, and either to throw that on the continuing

C. A. 1883 *In re* MANCHESTER ECONOMIC BUILDING SOCIETY. Cotton, L.J.

members, or to deprive the creditors altogether of the power of getting their money if the continuing members were not sufficient to pay and there was no winding-up within a year. That was the way in which they put themselves or their testator's estate in the position of past members. Now, in my opinion, those who acted in that way, if they claim to be entitled to the benefit of the 38th section and to stand in the position under that of past members, do not come in such a way before the Court that the Court ought, in consequence of the effect of allowing this appeal to be presented, to be induced not to do that which the Court would do if it were simply a question as between the Petitioner and the creditors (who all come here asking that this may be heard) and the company. I cannot regard them as standing in any better position than the company; I cannot regard them as persons with reference to whom the Court should be restrained from making that which under the circumstances, in order to obtain an effectual winding-up, is a proper order.

It was said, however—and I just mention that to shew I have not forgotten it—that the Petitioner here must be taken to have known that the resolution was a mere nullity. That was put on the ground that the Petitioner's solicitor had been present at the meeting when this resolution was passed, but a solicitor does not affect his client with notice of everything that he has known in his life; and if he was a party to that resolution, which he must have known was a void resolution, one cannot presume that he communicated to his client when he became his solicitor the fact that the resolution was a nullity.

I disregard, therefore, the objections raised by *Mather's* executors; but then there was another gentleman, a trustee in the liquidation of one of the shareholders, who continued and who was a continuing shareholder and not a mere man of straw. At the time when that resolution was passed he was not present, but the argument was this: that this order was a mere nullity, and that in consequence of its being a mere nullity the trustee might have paid away sums of money which he would not be entitled to be allowed if an effectual winding-up order was made on the petition. Now, in my opinion, he had no right to consider that

order as a nullity. It was not a nullity; it was one which ought to have been discharged before he proceeded to make payments on the footing that there was to be no winding-up. But more than that, he does not come here and state by affidavit that he has made any such payments, and I cannot conceive that any trustee in bankruptcy or trustee in liquidation would ever make any payments on the footing of that being a nullity. I cannot for a moment think it probable that he ever did anything of the kind. However, if he did, he did it in his own wrong, and he must take the consequences, and, in my opinion, his doing so would be no possible reason for preventing us from doing what justice requires, and giving leave to present an appeal, although the time for appealing had elapsed before the application was made.

BOWEN, L.J.:—

I am of the same opinion; and I would only add one word to shew how very inexpedient I think it would be from the point of view of justice to introduce any hard-and-fast line into the working of Order LVIII., rule 15, which is not to be found in the section itself. The section gives leave to the Court of Appeal practically to extend the time for appealing. It seems to me that to attempt in any one case to lay down a set of iron rails on which the discretion of the Court of Appeal was always to be obliged to run, and to say that the leave of the Court would never be granted except in certain special circumstances and in a defined way, would be very perilous. The Rules leave the matter at large. Of course it is to be exercised in the way in which judicial power and discretion ought to be exercised, upon principles which are well understood, but which had better not be defined in a case except so far as may be necessary for the decision of that case—otherwise there is the great danger, as it seems to me, of crystallizing into a rigid definition that judicial power and discretion which the Legislature and the Rules of the Court have for the best of all reasons left undetermined and unfettered. If the Appellant is asking for what is evidently unjust it is clear that he ought not to have it; if he is asking for what may lead to

C. A. 1883 *In re* MANCHESTER ECONOMIC BUILDING SOCIETY.

injustice he ought not have it except on the terms which would prevent any injustice possibly being done, and for that reason, if any of the Respondents here had shewn that injustice was likely to arise in their particular case, I think terms ought to have been imposed, but if the person who is asking for leave to appeal after twenty-one days is only asking for what is just, why should not he have it?

COTTON, L.J.:—

If the parties consent that the appeal shall be now heard, the order will be, the Court being of opinion that the Petitioner ought to have leave to appeal notwithstanding the time has elapsed, and all persons consenting that the appeal shall be forthwith heard, then on the appeal discharge the order and make a compulsory winding-up order. The Appellants will have the costs below, including the costs they are ordered to pay, out of the estate. The liquidator will also have his costs out of the estate.

The counsel for all parties having consented that the appeal should be at once heard, the order was made as proposed.

Solicitors for Petitioners: *Gregory, Rowcliffes, & Co.*, agents for *A. & G. W. Fox, Manchester.*

Solicitors for Respondents: *Chester & Co.*, agents for *Bullock & Worthington, Manchester; Hewitt*, agent for *Grundy, Boddington & Ball, Manchester.*

M. W.

C. A. 1882 CHITTY, J. *Nov.* 28. C. A. 1883 *June* 22.

In re J. B. PALMER'S TRADE-MARK.

Trade-mark—Cancelling of Registration—Special and distinctive Words used as a Trade-mark before the Trade-marks Act—Words descriptive of Patented Article—Trade-marks Registration Act, 1875 (38 & 39 *Vict. c.* 91), *s.* 10.

P. in 1876 registered "braided fixed stars" as a trade-mark for matches, alleging that he had used it as a trade-mark before the passing of the Act. He also at the same time registered a label enveloping the boxes in which his matches were sold, which contained the words "braided fixed stars" in

two places so as to be conspicuous on each side of the boxes, but also contained a number of other words. It was shewn that at the time when *P.* introduced the term "braided fixed stars" the term "fixed stars" was known in the trade as denoting a particular class of fusees, and that he had just bought a patent for enveloping the stems of fusees with wire by means of a braiding machine. This patent expired in August, 1881. It appeared from the evidence that *P.* had not before the Act used "braided fixed stars" separately as a trade-mark, or otherwise than as a part of the above-mentioned label. In October, 1881, an application was made by a rival trader to expunge the registration:—

Held, that the registration must be expunged, for that to entitle *P.* to register these words as a trade-mark he must before the Act have used them as such alone, and not merely in conjunction with other words.

Held, further, that if they had been so used alone they ought not to have been registered, for that they were only words properly descriptive of the patented article, and that *P.* had no exclusive right to their use after the patent had expired.

IN October, 1881, *Bryant & May*, match manufacturers, applied to cancel the registration under the *Trade-marks Registration Act* of a mark registered by *J. Palmer & Son*, and numbered 8075.

Two marks of *Palmer & Son* were advertised in the *Trade-marks Journal* of the 3rd of February, 1877, as follows:—

Trade-Mark.	Name, Address, and Calling of Applicant.	Class of Goods.	Description of Goods.	Number given by Registrar.	Date of Application received.	If Mark used prior to 13 Aug. 1875, how long used.
Braided Fixed Stars.	James Brecknock Palmer, trading as J. Palmer & Son, Palace Works, &c., Match Manufacturer.	47	Matches	8075	13 July, 1876	Seven years before 13 July, 1876.
No. 8076 (See above.)	James Brecknock Palmer, trading as J. Palmer & Son, Palace Works, &c., Match Manufacturer.	47	Matches	8076	13 July, 1876	Seven years before 13 July, 1876.

On the same page was a label numbered 8076, referred to by the second of these entries. A rough copy is given on the next page. The label as advertised was printed in an ornamental style, most of the words being printed on scrolls or labels, but it did not

C. A. 1883

In re J. B. Palmer's Trade-mark.

contain anything in the nature of a device. The marks were registered on the 4th of June, 1877.

WITHOUT PULLING OUT THE TOBACCO.
HEADS WILL NOT DROP OFF.
BRAIDED
SPECIALLY PREPARED FOR LIGHTING PIPES AS WELL AS CIGARS.
FIXED STARS.
MANUFACTURED UNDER
HER MAJESTY'S ROYAL LETTERS PATENT
AT
PALACE WORKS, OLD FORD ROAD, LONDON.
BY ROYAL LETTERS PATENT
PALMER & SONS
BRAIDED
FIXED STARS,
A COMBINED PIPE AND CIGAR LIGHTER.
HEADS WARRANTED NOT TO FALL OFF.
THESE FIXED STARS WILL LIGHT PIPES.

No. 8076

The term "braided fixed stars" was introduced by *Palmer & Son* in the year 1869. In that year they purchased a patent granted in 1867 to *H. J. Simlick*, who in his specification described his invention as follows:—

"I take an ordinary wooden splint or a stem composed of any of the ordinary suitable materials or compositions usually adopted for splints or stems in the vesuvian or match manufacture, and envelope it with a coating or net-work of iron or other metallic wire, or with sheet or other metal in conjunction with cotton or

any other suitable fibrous material or substance by means of an ordinary braiding machine; or I construct a network of the wire and cotton or other fibrous material by means of the aforesaid braiding or other suitable spring machine, and immerse it in a non-conductible composition such as plaster of Paris. When this coating or net-work composed as aforesaid is either woven over the aforesaid stem or filled in as aforesaid by the immersion aforesaid so as to form a non-conductibly coated stem by either of the means aforesaid in a complete form, the lengths whereof (having been cut and framed in the ordinary way) are dipped in a pastile composition specially prepared for adhering to the wire or metal so woven as aforesaid.

"The object of my invention is to produce a cigar or pipe-light which shall by the completeness of its construction palpably and at a glance assure the person manufacturing, vending, or using it that the wire to which the pastile composition has adhered has a permanent hold upon and to its stem without the ordinary hazard of falling off."

The cigar lights which *Palmer & Son* brought out in 1869 under the name of "braided fixed stars" were lights having stems made according to *Simlick's* patent. This patent expired on the 29th of August, 1881.

Bryant & May, match manufacturers, applied in October, 1881, to cancel the registration of the mark "braided fixed stars." Mr. Justice *Chitty* refused the application on the ground that its having been on the register for five years was conclusive. This decision was reversed on appeal, and the case was remitted to the Court below that it might be decided on the evidence whether the term was a term capable of being registered as a trade-mark or was a mere description of a known class of goods (1).

It appeared in evidence that prior to 1869 several persons had manufactured and sold fusees called "fixed stars," and that the expression was known in the trade as denoting fusees whose heads would not drop off when they were lighted. As regards the use of "braided fixed stars" as a trade-mark, Mr. *Bryant* deposed that he had never known the expression used by itself as a mark, and that *Palmer & Son* had only used it as part of the label 8076

(1) 21 Ch. D. 47.

C. A. 1883 ~~ *In re* J. B. PALMER'S TRADE-MARK. ——

which was put round the boxes in which their fusees were sold. Two witnesses for *Palmer & Son* deposed in general terms that *Palmer & Son* had sold fusees under the trade-mark of "braided fixed stars," but did not say that any label containing only those words had ever been used, nor was any such label produced.

The application was heard before Mr. Justice *Chitty* on the 28th of November, 1882.

Aston, Q.C., and *Carpmael*, for the application to expunge.

Romer, Q.C., and *Northmore Lawrence, contrà.*

CHITTY, J.:—

This is an application under the *Trade-marks Registration Act* by Messrs. *Bryant & May* to expunge from the register a mark registered by *Palmer & Son*, and which they alleged to have been used by them for seven years before the 13th of July, 1876. The mark consists of words only—"braided fixed stars."

The first ground on which the applicants rely depends on a question of fact. They say that "fixed stars" was a common term generally used before 1869 in the trade to denote a particular class of goods, viz. fusees the heads of which were so attached by wire or other means that they would not fall off; and further, that the term "braided" was merely a descriptive epithet shewing that the stems of the fusees were braided. Now upon an examination of the evidence in support of the application, I am satisfied that it cannot be contended that the term "fixed stars" was used by more than two manufacturers at most other than *Palmer & Son* before the 13th of July, 1869, when *Palmer & Son* began to use the term "braided fixed stars." [His Lordship examined the evidence on this head, and proceeded:—] The result of what I have stated is this, that at the utmost two, and as I think on the evidence only one manufacturer besides *Palmer & Son* used the term "fixed stars" in 1869. Now the well-known rule as to these matters is, that a mark does not become a common mark unless it has been used by more than three. In these circumstances I hold that the term "fixed stars" was not a common term in the trade designating a particular article, but was a trade-

mark used at most by three persons. It is said that the addition of "braided" to "fixed stars" is merely adding a descriptive epithet. That may be so, but that would not by itself disentitle Messrs. *Palmer & Son* to claim the whole term "braided fixed stars" as a trade-mark. That they used it as such is placed beyond all doubt by the applicants' own witnesses, one of whom stated that in the trade "braided fixed stars" were known as Messrs. *Palmer & Son's* manufacture and as the manufacture of no one else.

The second point put forward by the applicants was this. About 1869 *Palmer & Son* bought a patent which had been taken out by *Simlick* in 1867, and they manufactured fusees under it. The applicants allege that the term "braided fixed stars" was used to describe the articles manufactured under this patent, and that *Palmer & Son* could not have any trade-mark in that term. Now I consider it plain that a man can have a patent for a new manufacture, and at the same time a trade-mark in the name used to designate the goods, though they are made under the patent. To put an obvious example, if a man obtained a patent for improvements in the manufacture of soap, and sold the soap made according to it under a fancy name, such as "excelsior soap," and the term came in the market to designate the soap of his manufacture, he would have a good trade-mark collateral to his patent. I quite agree with what was said by Mr. Justice *Fry* in *Linoleum Manufacturing Company* v. *Nairn* (1), "In my opinion it would be extremely difficult for a person who has been by right of some monopoly the sole manufacturer of a new article, and has given a new name to the new article, meaning that new article and nothing more, to claim that the name is to be attributed to his manufacture alone after his competitors are at liberty to make the same article." But I am persuaded that his Lordship never meant to lay down that a man cannot have a trade-mark collateral to his patent right. The question is, as was clearly pointed out by Lord *Cairns* in *Singer Machine Manufacturers* v. *Wilson* (2), whether the term is used to denote an article of a particular type, shape, or arrangement, or to denote an article made by a particular manufacturer. The judgment of the Court of Appeal

(1) 7 Ch. D. 834, 837.
(2) 3 App. Cas. 376, 384.

C. A. 1883 *In re* J. B. PALMER'S TRADE-MARK. Chitty, J.

in *Cheavin* v. *Walker* (1) is in no sense inconsistent with what I have stated. The Master of the Rolls there says (2): "It is therefore impossible to allow a man who has once had the protection of a patent to obtain a further protection by using the name of his patent as a trade-mark;" and Lord Justice *James* says (3), "It is impossible to allow a man to prolong his monopoly by trying to turn a description of the article into a trade-mark. Whatever is mere description is open to all the world." Now in the present case the evidence of the Respondents to my mind clearly shews that *Palmer & Son* did not use the term "braided fixed stars" solely with regard to the articles manufactured under *Simlick's* patent. [His Lordship then referred to the evidence.] The result is, that I hold that on this second ground the application fails.

The third ground alleged by the applicants is, that the evidence shews that *Palmer & Son* did not use the term "braided fixed stars" as a separate trade-mark. The 10th section of the Act provides that "any special and distinctive word or words or combination of figures or letters used as a trade-mark before the passing of this Act may be registered as such under this Act." It was urged by the Respondents that in order to bring the case within this provision it was not necessary that the special or distinctive words should have been used alone; but in my opinion that would not be the right mode of construing the Act. Seeing the contrast that is expressed between mere words and words in combination with a device, I hold that words which are said to have been used as a trade-mark before the passing of the Act must in order to entitle them to registration have been used solely and not in combination with any device. I think that "used as a trade-mark" means "used by themselves as a trade-mark," not "used as part of a trade-mark." So far as this point of law goes I am in favour of the applicants. [His Lordship then entered into a consideration of the evidence on this point, referring especially to affidavits by *Jackson*, the Respondent's manager, and *Bristow*, their present foreman.] As a matter of fact I hold that those witnesses state that the

(1) 5 Ch. D. 850. (2) 5 Ch. D. 862.
(3) 5 Ch. D. 863.

C. A.
1883
In re J. B. PALMER'S TRADE-MARK.
Chitty, J.

term "braided fixed stars" was used as a trade-mark, and on the fair construction of their affidavits, I hold that it was used independently of any device. On the register it appears that *Palmer & Son* have another trade-mark in which the term "braided fixed stars" occurs, but coupled with ornamental devices. Even if the applicants had succeeded on this point it would have been a success which would not have availed them much upon the real question in dispute. I am of opinion that I ought to give credit to the affidavits of *Jackson* and *Bristow*, and that it would be an error to allow the evidence on the other side, which is of the weakest kind, to prevail against this testimony. The application must be dismissed with costs.

G. M.

C. A.

Bryant & May appealed. The appeal was heard on the 22nd of June, 1883.

Aston, Q.C., and *Carpmael*, for the appeal:—

We say that at the time when *Palmer & Son* first used the term "braided fixed stars," the term "fixed stars" was nothing but a well-known description of a particular kind of fusee which was made under that name by several manufacturers, and that this term therefore was not capable of being made a trade-mark. If it was not, then "braided fixed stars" was not, for the word "braided" is nothing but a proper description of the manufactured article as modified by using *Simlick's* braided stems. It is admitted that we are now at liberty to make these articles, the patent having expired; but *Palmer & Son* insist that we cannot even sell them under the name of "braided cigar lights." Now we say first, that these words could not constitute a trade-mark—they were simply descriptive.

[COTTON, L.J.:—The question on that branch of the case appears to be whether a patentee by his exclusive use of the name of a patented article during the continuance of the patent makes it his trade-mark.]

That is one point, and we submit that he does not. The other point is that *Palmer & Son* never used "braided fixed stars" alone

C. A. 1883 *In re* J. B. PALMER'S TRADE-MARK.

as a trade-mark. There is no evidence that they ever used anything by way of trade-mark except the mark 8076.

[THE COURT here stated to Mr. *Romer* that if he wished it they would give him the opportunity of adducing evidence that *Palmer & Son* had used the words "braided fixed stars" as a mark not combined with other words.]

Mr. Justice *Chitty* goes on this, that only three manufacturers were using the name "fixed stars."

[BAGGALLAY, L.J.:—Is there any authority for the proposition that a name is not to be treated as a known description of an article of manufacture, unless more than three manufacturers have used it?]

We do not know of any. The term was a known description and incapable of being registered as a trade-mark: *In re Hyde & Co.'s Trade-mark* (1). The case of *Linoleum Manufacturing Company* v. *Nairn* (2) lays down a rule on which we rely:—"If 'linoleum' means a substance which may be made by the defendants, the defendants may sell it by the name which that substance bears." So if "braided fixed stars" is known in the trade as denoting a particular article, anyone who is at liberty to make and sell it may sell it under that name. And there are further observations shewing that the name of a patented article is not to be considered as denoting articles manufactured by the patentee when everybody else is at liberty to make it. That case is stronger than the present, for there "linoleum" when first used was not a descriptive term but a fancy name. Whatever is mere matter of description is open to all the world: *Singer Machine Manufacturers* v. *Wilson* (3); *Cheavin* v. *Walker* (4).

Romer, Q.C., and *Northmore Lawrence*, *contrà*:—

The Appellants raise three points: (1.) That the term "braided fixed stars" is simply descriptive and incapable of being the subject of a trade-mark. (2.) That if it was otherwise capable of being such it could not be so, because it was only used as a description of a patented article.

(1) 7 Ch. D. 724.
(2) Ibid. 834, 836.
(3) 3 App. Cas. 376.
(4) 5 Ch. D. 850.

[Cotton, L.J.:—Rather this—that the term was nothing more than a fair description of a patented article, and that there could not be any monopoly in it when the patent had expired.]

(3.) That there is no evidence that we did use "braided fixed stars" as a trade-mark.

As to the first point, "fixed stars" was originally a fancy name, how do the Appellants make out that it had become simply descriptive? This evidence only goes to this, that three firms used the words "fixed stars." This is not sufficient to make the name a common name descriptive of an article; it is only the case of three people using it by way of a trade-mark. Then as to the second point, we say the name "braided fixed stars" is not simply a fair description of a patented article, but a fancy name, which would convey the idea that *Palmer & Son* were the manufacturers. As to the third point, supposing that we did not use the term "braided fixed stars" alone, the question is whether a third party can use the essence of a trade-mark, leaving out some unimportant words? A trade-mark cannot be split up in this way. Surely another brewer would not be at liberty to use *Bass's* triangle, because *Bass & Co.* had always used it in conjunction with the name of their firm. The case is like *Singer Machine Manufacturers* v. *Wilson* (1). It has never been held that a person cannot have an exclusive right to certain words on a plate affixed to goods, merely because they were associated with some other words.

Carpmael, in reply:—

What we proposed to do was to use the term "braided cigar lights," and the Respondents complained of this, objecting to our use of the word "braided." The term "braided" is certainly nothing more than a fair description of an article made according to *Simlick's* patent, and there cannot be any exclusive right to it after the patent has expired. As to using part of a trade-mark, we say that if a person registers an old trade-mark he must register the whole and not merely a part of it. Whether the use of the most distinctive part of it by another person is not an infringement, is an entirely different question. Unless a man

(1) 3 App. Cas. 376.

C. A. 1883 *In re* J. B. PALMER'S TRADE-MARK.

shews on the label which he uses that only a part of it is his trade-mark, he cannot say that a particular part of it is its essence. It was only secondarily that "braided fixed stars" came to denote an article manufactured by *Palmer & Son*. It was primarily a mere description of the article, and was only associated with *Palmer & Son* because during the continuance of the patent they were the only persons who were at liberty to make the article.

BAGGALLAY, L.J.:—

This is an appeal against a decision of Mr. Justice *Chitty* refusing to rectify the register of trade-marks in respect of a particular trade-mark the application to register which was made on the 13th day of July, 1876, and which appears in the *Trade-marks Journal* of the 3rd of February, 1877, under the name "braided fixed stars," registered by a Mr. *Palmer*, and it is there stated to have been used seven years before the 13th day of July, 1876, the date of the application. The actual registration took place in June, 1877.

The 10th section of the *Trade-marks Registration Act* gives a definition of trade-marks. They are ranged under four several heads: (1.) "A name of an individual or firm printed, impressed, or woven in some particular and distinctive manner;" (2.) "A written signature, or copy of a written signature, of an individual or firm;" (3.) "A distinctive device, mark, heading, label, or ticket." This third definition has been held not to apply to a mere combination of words, and it is not argued that the alleged trade-mark now in question could be registered as coming under any of those three heads. But the fourth head is, "Any special and distinctive word or words or combination of figures or letters used as a trade-mark before the passing of this Act," and the question we have to consider in the present case is whether the words "braided fixed stars," that have been so registered as a trade-mark, were "special and distinctive words used as a trade-mark before the passing of this Act." We must, I think, take the word "trade-mark" in that sub-section to mean a trade-mark as commonly understood previously to the passing of the Act, for as regards new trade-marks the earlier sub-sections of the

10th section confined the class of things which may constitute trade-marks within somewhat narrower limits than before.

An opportunity was given by us to the Respondents of producing evidence to shew an actual user of the words "braided fixed stars" without any additions as a trade-mark, and of that opportunity the Respondents did not think it desirable or prudent to avail themselves. I take it for granted therefore that no trade-mark using only the words "braided fixed stars" as registered on the 13th of July, 1876, under the number 8075 had previously been used. But upon the same date another trade-mark, No. 8076, was registered. This also is a trade-mark which is alleged to have been used as a trade-mark for seven years before the date of registration. It is in the form of a label surrounding an envelope or box into which a particular class of cigar lights were introduced. The label is set forth in the *Trade-marks Journal*, and it contains these words, "Heads will not drop off. Braided fixed stars, specially prepared for lighting pipes as well as cigars. Manufactured under Her Majesty's Royal Letters Patent at *Palace Works, Old Ford Road, London*," and in another portion, "By Royal Letters Patent. *Palmer & Son's* Braided Fixed Stars, a combined pipe and cigar lighter. Heads warranted not to fall off. These fixed stars will light pipes without pulling out the tobacco." That label is arranged so that different portions of it appear on the four several sides of the envelope or box.

In the first instance it has been contended that, assuming the separate label "braided fixed stars" not to have been used as a trade-mark before the Act came into operation, yet that the words "braided fixed stars" appeared in two several portions of this label or envelope, and that there was a sufficient user of those particular words to entitle them to be registered as a trade-mark, because on the one side of the box we have "*Palmer & Son's* Braided Fixed Stars," and on another side "Braided Fixed Stars, specially prepared for lighting pipes as well as cigars." It has been urged that the introduction of those words upon the label surrounding the box was sufficient to protect the particular trade-mark which it is proposed now to remove from the register. We are thus driven back to this question: Are these words "braided fixed stars" special and distinctive words or a combination of

C. A. 1883 *In re* J. B. PALMER'S TRADE-MARK. Baggallay, L.J.

letters used as a trade-mark before the passing of the Act? In my opinion they are not. It will perhaps be well for me to say at once that, even if evidence had been given of the user of the specific trade-mark limited to "braided fixed stars," I should be of the same opinion. I say so for this reason. The words are three in number—braided fixed stars. I understand "fixed stars" to mean cigar lights, and the word "braided" to indicate their having been prepared in a particular way. Now we have it in evidence that certainly from the year 1860 a particular kind of cigar lights, viz., cigar lights manufactured in such a way that their heads do not drop off when lighted, have acquired the general name of fixed stars. It also appears that different modes have been adopted for the purpose of securing the head from falling off. As early as the year 1859 two patents were taken out, one for fixing on the heads with a wire, and the other by having the stems composed of porcelain or glass or some similar material, and cigar lights manufactured under those patents acquired the name of "fixed stars." The name seems to have been understood as characterising that class of cigar lights the heads of which do not come off when they are ignited, and certainly I, for my part, am satisfied upon the evidence that the general expression "fixed stars" for this class of cigar lights had been used for six years before this trade-mark was registered.

But, then, does the fact that they are called "braided fixed stars" make any difference? The word "braided" is introduced I presume for this purpose. A patent taken out by *Simlick* was purchased by *Palmer & Son* in June, 1869. That patent expired in 1881, and under that patent *Palmer & Son* manufactured for many years the cigar lights which they called "braided fixed stars." They were manufactured under a patent which was for the purpose of braiding the stems of cigar lights, that is passing round them by the use of an ordinary braiding machine a network of fine wire. It can therefore be seen at once that the words "braided fixed stars" were used to denote fixed stars manufactured under this patent. The addition of the words "under Her Majesty's Royal Letters Patent" upon the envelope supports that view of the case. As I read it, the word "braided" was used merely to denote that those were fixed stars made with

stems braided in the manner pointed out in the letters patent. I do not think that the combination of the word "braided" with the two words "fixed stars" forms a special and distinctive combination sufficient to bring the case within the intent and meaning of the 4th sub-section of the 10th section of the Act. It is obvious that nobody else could make braided fixed stars so long as the patent continued, and if by reason of the patentee using a word descriptive of the nature of his patent for the purpose of describing his article he can acquire a title to the exclusive use of that name afterwards, it would simply be enabling him by a perversion of the *Registration of Trade-marks Act* to give an indefinite extension to the monopoly acquired by him under the patent.

For these reasons I am of opinion that the alleged trade-mark, No. 8075, was not a trade-mark such that an exclusive right to its use could have been enforced before the Act came into operation. It was not, therefore, such a trade-mark as Mr. *Palmer* was entitled to register under the Act, and that being so, I think that its registration should be expunged.

Cotton, L.J.:—

This is an application by way of appeal from Mr. Justice *Chitty* to strike out of the register the entry of "braided fixed stars" as a trade-mark. Before considering the law of the case it is necessary to consider the question of fact whether Messrs. *Palmer & Son* have used these words otherwise than on and as part of a label wrapped round their boxes, which label contains many other words, and has been separately registered as a trade-mark. The conclusion at which I have arrived upon that question of fact is, that they never did use the words "braided fixed stars" separately as a trade-mark, that they never put those words upon the goods sold by them except as part of and upon the label to which I have referred. Mr. *Bryant* in his evidence stated that the words "braided fixed stars" had never been used by *Palmer & Son* except in that label. This evidence might have been met by production of a label containing the words "braided fixed stars" only, but no such label has been produced. The other label was produced, and the printer proved that he printed it, but Messrs. *Palmer & Son's* counsel asked him no question as to his having

C. A. 1883 *In re* J. B. PALMER'S TRADE-MARK. Cotton, L.J.

printed any other label. The learned Judge in the Court below appears to have relied on the evidence given by a witness who said that these fusees had been sold by Messrs. *Palmer & Son* under their trade-mark of "braided fixed stars." But the witness does not say that the words "braided fixed stars" were ever used by them on a separate label, and, in my opinion, the inference to be drawn from the evidence is that they were not. That this inference was correct is, I think, made clear by this, that after expressing our opinion that that was the *primâ facie* result of the evidence, we offered Messrs. *Palmer & Son* an opportunity of proving that they had used those words separately as a trade-mark, but they did not desire to bring any further evidence on the question.

Now, what is the result of that state of facts? The Act does not allow words alone as distinguished from the name or the signature of any individual to be used as a trade-mark unless they have been used as one before the Act. What we have to consider is whether this condition has been fulfilled, whether these words were used as a trade-mark before the passing of the Act. I have come to the conclusion that what is required is not that it shall be shewn that together with a certain device words have been used which may have been an important part of the trade-mark made up of the device and the words, but that the words have by themselves been used as a trade-mark. That I think must be so, because under the previous part of the section "a distinctive device, mark, heading, label, or ticket" may be registered under the Act as a new trade-mark accompanied with words, but words alone cannot be registered unless it has been shewn that they had been used as a trade-mark previously to the Act. Mr. Justice *Chitty* appears to have come to the same conclusion as to the requirements of the Act.

It was said that these words, "braided fixed stars," were a most material part of the old label, and that no one could have used them without being liable to an injunction. Undoubtedly if they were used in such a way as to be a colourable imitation of a trade-mark which also contained other words, an injunction might be obtained; but I think that the argument overlooks the distinction between that which is a trade mark and that which is a

colourable imitation of a trade-mark. I should say, therefore, that if the matter rested there the requisitions of the Act had not been complied with.

But we must look more closely at the circumstances of the case. At the time when these words were first used by Messrs. *Palmer & Son*, and during the whole time that they used them down to August, 1881, they were the proprietors of a patent for an invention which may be described shortly as braiding the stems of these fixed stars. The words "fixed stars" do not occur in the patent, but we know that the term "fixed stars" was at the time when braided fixed stars were introduced used by some other people, and the very label outside these boxes does not merely call them "braided fixed stars," but refers to them as "these fixed stars"—referring to fixed stars as something existent independently of braided fixed stars. Now, although the patentee does not use the term "fixed stars," and although he does not use the term "braided" as applied to stars nor to fixed stars, he does say that the object of the invention is to envelope the splint or stem used in the vesuvian manufacture (and fixed stars are vesuvians of a particular character), "with a coating or network of iron, or other metallic wire, or with sheet or other metal in conjunction with cotton or any other fibrous material or substance by means of an ordinary braiding machine." That being so, these words, which it is attempted to register as a trade-mark, were fairly descriptive of the invention as applied to the improved vesuvians—"braided fixed stars." And that being so I cannot come to the conclusion that those words although used on this label have been used as a trade-mark. They have been used during the existence of a patent, and I think they fairly describe the article which was protected by the letters patent. It is very true in one sense that these words did in the trade point to the goods manufactured by Messrs. *Palmer & Son*, but only because they, in consequence of their having the patent, were the only persons who could make or sell braided fixed stars. In that way the words pointed to them, but in my opinion they described a patented article, and pointed to the patented article, and not to *Palmer & Son* as the manufacturers independently of its being a patented article.

C. A. 1883 *In re* J. B. PALMER'S TRADE-MARK. Cotton, L.J.

It is very true (and although this was not mentioned in argument I mention it to shew that it has not been overlooked) that if any one during the existence of the patent had applied the name which the patentee had given to his article to an article not an infringement of the patent he would probably have been stopped by injunction, but only because, although it would not have been an infringement of the patent, it would have been a false representation that what he was selling was the patented article. In one sense, therefore, the name of the article might be called a trade-mark, but the user of it would not be a user of a trade-mark in the sense in which Messrs. *Palmer & Son* must establish a user for the purposes of this Act.

In my opinion the fact is established that the only user of these words was on this label on the boxes of Messrs. *Palmer & Son*, and that in my opinion does not satisfy the requirements of the 10th section of the Act. We must, therefore, come to the conclusion on the evidence that these words "braided fixed stars" were not used as a trade-mark before the passing of the Act, and that the registration of them must be expunged.

LINDLEY, L.J.:—

I am of the same opinion, and have but little to add. The question turns on the proper construction of sect. 10 of the Act of 1875. Now I take it to be established that the mark 8075 has never been used apart from and except as part of the other mark or label, 8076. Mr. Justice *Chitty* came to the conclusion that it had been so used, but upon this question of fact I differ from him. Having regard to the evidence upon that point, and to the opportunity given here to Mr. *Romer* to produce any label or mark containing only the words "braided fixed stars," the inference appears to me unavoidable that those words were never used except as part of the larger label.

Now having disposed of that as a question of fact we come to the true construction of the section, and I proceed to ask whether this mark 8075 was used as a trade-mark by Messrs. *Palmer & Son* before the passing of the Act. My answer to that is, certainly not, and in proof of that it appears to me only necessary to appeal to their own label 8076. That label tells us exactly what the real

truth is. It begins—"Braided fixed stars. Manufactured under Her Majesty's Royal Letters Patent, at *Palace Works, Old Ford Road, London*"—that is to say the articles are the things which are made under that patent, and I did not understand the evidence to contradict that. It is very true that there is evidence to shew that inasmuch as Messrs. *Palmer & Son* were the only manufacturers, those goods were known in the trade as of their manufacture. Of course they were, but that is not, as it appears to me, the test of this case. It is the test where there are a number of manufacturers, and where a trade-mark is affixed to the goods of each manufacturer; or where there are several manufacturers, and one of them adopts a trade-mark to designate, not a particular class of goods, but the goods which he makes as distinguished from similar goods made by other people. But where goods of a particular description can only be made by one firm, that test becomes altogether inapplicable. It strikes me as plain to demonstration, on the evidence, that this expression "braided fixed stars" meant a patented article which was indeed made by Messrs. *Palmer & Son*, but that it was not intended to denote Messrs. *Palmer & Son* as distinct from other makers.

Then if that is so, the case is brought distinctly within the authority (if authority were wanted), of *Linoleum Manufacturing Company* v. *Nairn* (1), and this is to my mind an attempt (I do not say an improper attempt), on the part of Messrs. *Palmer & Son* to use the trade-mark for the purpose of prolonging their patent. It appears to me that that is what is contemplated, and it is what ought not to be allowed. I do not mean to say that a manufacturer of a patented article cannot have a trade-mark not descriptive of the patented article so as to be entitled to the exclusive use of that mark after the patent has expired; for instance, if he impressed on the patented articles a griffin, or some other device; but if his only trade-mark is a word or set of words descriptive of the patented article of which he is the only maker, it appears to me to be impossible for him ever to make out as a matter of fact that this mark denotes him as the maker as distinguished from other makers. At all events, the Respondents have not made it out here, and it appears to me therefore that

(1) 7 Ch. D. 834.

C. A. 1883 *In re* J. B. PALMER'S TRADE-MARK.

this is a mark which is not authorized to be registered under the Act, and that, therefore, the registration ought to be expunged.

Solicitors for *Bryant & May: Wilson, Bristows, & Carpmael.*
Solicitors for *Palmer & Son*: *Hollams, Son, & Coward.*

H. C. J.

C. A. 1883 CHITTY, J. *May* 4. C. A. *July* 5, 7.

LANGEN *v.* TATE.

[1880 L. 72.]

Evidence—Witness resident Abroad—Commission—Rules of Court, 1875, *Order* XXXVII., *r.* 4.

L. granted to *T.* an exclusive license to use in *England* a certain patented invention for making sugar. This invention was also patented in *America*, and *M.*, an American sugar manufacturer, had a license for its use in the *United States*. *L.* brought his action against *T.* to have the license rectified, alleging that the real agreement between the parties was that the license was not to interfere with the importation into *England* of sugar made abroad under the patent. The statement of claim alleged that *M.* had introduced *L.* to *T.*, and that the negotiations between *L.* and *T.* had proceeded on the understanding that sugar made abroad under the patent might be imported; but there was no allegation, nor did it appear in evidence, that *M.* had taken part in the negotiations. *L.* applied to have a commission to examine *M.* in *America*:—

Held, by *Chitty*, J., that the application must be refused as in *Berdan* v. *Greenwood* (1), for that it was essential that *M.*, an interested witness, should be examined and cross-examined orally before the Judge who tried the case.

Held, by the Court of Appeal, that if it appeared that the evidence of *M.* would be material, the commission ought to be granted, there being nothing to shew that *M.* was keeping out of the way to avoid cross-examination; and that *Berdan* v. *Greenwood* turned on the fact that the Court was convinced that the plaintiff there was so keeping out of the way.

But, *held*, that on the materials before the Court the commission was rightly refused, there being nothing to shew that *M.* had taken such part in the negotiations as to make his evidence material. The Court, however, as an indulgence, gave the Plaintiff an opportunity of adducing evidence to shew that *M.* could give material evidence.

BY an indenture dated the 13th of March, 1875, the Plaintiff granted to the Defendants during the continuance of three English patents the exclusive right of making, using, exercising,

(1) 20 Ch. D. 764, n.

and vending for their own benefit the three patented inventions which were inventions of processes in the manufacture of sugar. The Plaintiff had letters patent in the *United States* for the same invention.

The Plaintiff, by his statement of claim, alleged that he had before the date of the above license granted to a Mr. *Matthiessen*, a sugar refiner in the *United States*, a license to work the patented inventions in the *United States*, that "the Defendants were introduced to the Plaintiff by *Matthiessen* for the purpose of obtaining from the Plaintiff a license to make the said three several patented inventions, or any of them, in this country, and negotiations took place between the Plaintiff and the Defendants on the subject, and ultimately it was agreed between them that a license should be granted by the Plaintiff to the Defendants. The Defendants during such negotiations, and before such licenses were granted to them, knew that *Matthiessen* was a licensee from the Plaintiff as aforesaid, and the negotiations between the Plaintiff and the Defendants for their said license proceeded, and the Plaintiff agreed to grant, and the Defendants agreed to take, and the license was prepared and executed by the Plaintiff and Defendants, with the intention and upon the understanding and belief between and by the Plaintiff and the Defendants that all persons would have the right of selling in this country sugar made in a foreign country according to the before mentioned patented inventions." That shortly after the execution of the license to the Defendants, *Matthiessen*, with the knowledge and acquiescence of the Defendants, commenced and had continued to send into and sell in *England* sugar made in *America* according to the patented inventions without any objection being made by the Defendants till December, 1879. That the Plaintiff had recently discovered that the license as drawn was inconsistent with the above understanding. That the license had been framed as it was owing to a common mistake, and the Plaintiff asked to have it rectified so as to enable all persons to sell in *Great Britain* sugar made in a foreign country under the patents.

Issue was joined in the action on the 8th of July, 1880, but owing to proceedings as to an affidavit of documents by the

C. A. 1883 LANGEN v. TATE.

Defendants the Plaintiff's time for giving notice of trial did not expire till the 2nd of October, 1882. The time was extended, and ultimately notice of trial was given on the 26th of October, 1882, and the action set down on the 28th.

On the 22nd of February, 1883, the Plaintiff took out a summons for a commission to examine *Matthiessen* in *America*. On the 10th of April, 1883, this summons was dismissed. The Plaintiff moved to discharge the order of dismissal and to have an order for a commission.

One of the Plaintiff's solicitors deposed as follows:—

"As I am advised and believe it will be most prejudicial and disastrous to the Plaintiff if he should have to proceed to the trial of this action without the evidence of Mr. *Matthiessen*. He is the gentleman who introduced the Plaintiff to the Defendants and opened the negotiations with them, and, as I am informed, matters passed between the said Mr. *Matthiessen* and the Defendants during the interviews between them, which, as I am advised, are most material to be proved by the said Mr. *Matthiessen* for the purposes of the Plaintiff's case."

The Plaintiff's solicitors had been furnished with particulars of the evidence which *Matthiessen* could give, but the nature of these particulars did not appear.

On the 10th of April, 1883, the day on which the summons was dismissed, *Matthiessen* had telegraphed from *America* that it was impossible for him to come over to be examined.

The motion came on before Mr. Justice *Chitty* on the 4th of May, 1883.

Aston, Q.C., and *Nalder*, for the Plaintiff.

Ince, Q.C., and *Lawson*, *contrà*.

CHITTY, J.:—

This is an application to discharge an order made in Chambers which refused an application on the part of the Plaintiff for a commission to *America* for the purpose of examining Mr. *Matthiessen*, who is said on the part of the Plaintiff, and this is not denied

on the part of the Defendants, to be not merely a material but a most material witness in the cause. The present application, as well as that made to me in Chambers, depends upon Order XXXVII. rule 4. According to the terms of that rule it must appear to be necessary for the purposes of justice that the order should be made. Mr. *Matthiessen* is resident in *America*, and is undoubtedly largely interested in the success of this action, for as matters now stand he cannot introduce into this country sugar made by him in *America* under the patents.

The Plaintiff's claim is to have a solemn deed of the 13th of March, 1875, rectified so as to make it consistent with what he alleges to have been the common intention of the parties when it was executed. In order to prove his case he says that he must examine Mr. *Matthiessen* to prove what was the intention of the parties.

Now every one conversant with matters of this kind knows that in every case of questions of disputed fact it is of the highest importance that the witness should appear before the Court that has to decide the question of fact. That is so *à fortiori* where the Plaintiff claims to rectify a deed, not in conformity with some written document, but in conformity with the intention to be proved by oral evidence. For any Judge or jury to decide such a question fairly, it is absolutely necessary that the witness on whose testimony this alleged intention depends should appear in person.

Now it appears to me not to be necessary for the purposes of justice that this commission should issue. On the contrary, I think that it would tend to defeat justice if the witness should be examined under a commission, for the demeanour of the witness will be an important element in determining the weight to be given to his testimony. I respectfully accede to the proposition laid down by the Court of Appeal in *Berdan* v. *Greenwood* (1), and I say that I cannot assume under the circumstances of this case that Mr. *Matthiessen* is a witness to whose evidence the highest credit is to be given. It is therefore, to my mind, of the highest importance that when the trial comes on Mr. *Matthiessen* should appear in person, so that the Judge will have the assistance which

(1) 20 Ch. D. 764, n.

C. A. 1883 LANGEN v. TATE.

is given by observing the way in which he gives his evidence. It seems to me that this ground is sufficient to dispose of the motion.

[His Lordship then observed upon the delay on the part of the Plaintiff, but stated that it was not necessary to dispose of the case on that ground.]

C. A.

The Plaintiff appealed, and the appeal was heard on the 5th of July, 1883.

Aston, Q.C., and *Nalder*, for the Appellant:—

We expect *Matthiessen* to prove that it was his intention as agent of the licensor that the license should leave unaffected the importation into this country of sugar made abroad under the patents, and that the negotiations throughout proceeded on this footing. The Court will not try the merits on an application of this kind, but will only see whether there is a *bonâ fide* case for examining the witness: *Crofton* v. *Crofton* (1). We should be very glad to have *Matthiessen* examined here, but he refuses to come, and we have no power to make him come. If, therefore, he is not examined on commission we shall lose his evidence, and there will be a denial of justice. *Berdan* v. *Greenwood* (2), on which Mr. Justice *Chitty* relies, was a very different case. There the person who would not come to be examined was the Plaintiff himself, and the Court believed that he was purposely keeping out of the way of cross-examination.

Ince, Q.C., and *Lawson*, *contrà*:—

Such an order as is now asked for ought not to be made unless it is necessary for the purposes of justice. There has been gross delay on the part of the Plaintiff, and he does not shew that any *bonâ fide* applications have been made to *Matthiessen* to come over. The Plaintiff must shew that it is impossible to have him here.

[BOWEN, L.J.:—I am hardly prepared to go that length.]

Perhaps that is putting it too high; but at all events the Plaintiff must shew that *bonâ fide* attempts have been made to get him to come over, and nothing is shewn but a telegram

(1) 20 Ch. D. 760. (2) 20 Ch. D. 764, n.

saying he cannot come, without any evidence what applications had been made to him. None appear to have been made at all till after the summons for a commission had been taken out. For anything that appears he would come if a proper application were made to him. There is no allegation in the pleadings that *Matthiessen* conducted the negotiations, and if not he is not a material witness.

Aston, in reply:—

The last point is new. The Defendants first relied on delay, which was overruled by Mr. Justice *Chitty*, then on *Berdan* v. *Greenwood* (1), on which ground he decided in their favour; and now a fresh point is started, though, as Mr. Justice *Chitty* observed in his judgment, it was admitted throughout that *Matthiessen* was a most material witness.

July 7. COTTON, L.J.:—

This is an appeal from Mr. Justice *Chitty*, refusing an application on the part of the Plaintiff to have a commission to examine a witness in the *United States*.

The nature of the action was this. The Plaintiff had by deed granted to the Defendants an exclusive license to use certain patents in *England*. The Plaintiff alleges that there was a common mistake as to the effect of the license as drawn, and that on that ground, or on the ground that the true contract is not expressed in the deed as executed, the deed ought to be rectified. The Plaintiff sought to examine a Mr. *Matthiessen*, who was to a certain extent interested in the action, because it is alleged that the result of the deed as it stands is to prevent *Matthiessen* from importing into *England* sugar made in the *United States* according to the patents. He is a merchant or manufacturer carrying on business in the *United States*, and the application to Mr. Justice *Chitty* was to examine him in the *United States*. That was refused, and it was refused partly on the ground of delay by the Plaintiff, but principally, and in fact, the Judge puts his decision on the ground that, as it was a case where the Plaintiff was seeking to rectify a written contract by the parol evidence of

(1) 20 Ch. D. 764, n.

C. A. 1883 LANGEN v. TATE. Cotton, L.J.

an interested witness as to what the real agreement was, it was essential that the witness should be in Court to be examined and cross-examined. That is most important in every case, and I can hardly see that it is more important in this case than in many other cases. This is not a case where the Plaintiff is seeking to have a commission to examine himself, and where the Defendants, desiring to cross-examine him, satisfy the Court that the Plaintiff is keeping out of the way in order to avoid cross-examination; the case is simply this, that a material witness, not being the Plaintiff himself, is carrying on business in the *United States* and desires to be examined there and not to come over to *England*. That being so, we have to decide what the justice of the case requires as regards the examination of the witness. If the ground taken by Mr. Justice *Chitty* were the sole ground of objection to a commission, that, in our opinion, would be an insufficient objection, and the Plaintiff would be entitled, subject to terms under which we should put him, to have a commission to take the evidence in the *United States*. The case is quite different from the case which was relied upon in the Court below of *Berdan* v. *Greenwood* (1). There the Court was satisfied that the reason given for the plaintiff's not coming to *England* was a pretence, and was only brought forward to enable him to avoid being cross-examined in Court. The Court said that they would not assist him in that scheme, and that if his evidence were material to his case, he must come and give it in person. That authority, we think, does not apply to the present case.

But there is, in my opinion, as the case stands, a fatal objection to the granting a commission. We ought not to grant a commission, which must involve a considerable amount of expense and trouble, unless we are satisfied that the evidence is material to the issue raised. Now, all that appears on the pleadings and on the evidence before us is this: On the pleadings it appears that Mr. *Matthiessen* introduced the Plaintiff to the Defendants, and for all that appears he took no further part in the negotiation. When that was pointed out an affidavit was referred to which really does not carry the case any further, at all events, not so far as to satisfy our minds that anything which could be stated by

(1) 20 Ch. D. 764, n.

Mr. *Matthiessen* would be relevant to the question which has to be decided. All that is stated in the affidavit is this, "that Mr. *Matthiessen* is the gentleman who introduced the Plaintiff to the Defendants and opened the negotiations with them, and, as I am informed, matters passed between Mr. *Matthiessen* and the Defendants during interviews between them, which, as I am advised, are most material to be proved." Now, that merely refers to interviews which took place between Mr. *Matthiessen* and the Defendants preliminary to the introduction to the Plaintiff, and what passed between *Matthiessen* and the Defendants at those interviews would not be evidence on the question what agreement was come to between the Plaintiff and the Defendants. Therefore upon the materials before us the appeal, in my opinion, fails.

But then undoubtedly the Plaintiff might make a further application on further evidence to the Court below, subject of course to an appeal to this Court, and we think it would be better for both parties to allow the Plaintiff an opportunity, if he thinks fit, to file before this day week a further affidavit to shew what part Mr. *Matthiessen* took in the negotiations between the Plaintiff and the Defendants, and the deponent must shew the points on which he believes that *Matthiessen* is able to give evidence. Undoubtedly the Plaintiff's solicitors can do that, because we have it in evidence that a statement of the points on which Mr. *Matthiessen* can give evidence has been for some time in their hands, although the contents of it have not been disclosed. They can therefore state, to the best of their information and belief, the part which Mr. *Matthiessen* took in the negotiations, and the points on which he can give evidence; so as to enable the Court to judge whether the evidence can be relevant and material, and whether, therefore, justice requires that there should be an examination in *America*. I say justice requires, because we think that although Mr. *Matthiessen* is interested, we cannot deal with him as a person keeping out of the way. He is carrying on business in *America*, and there is no evidence to satisfy us that his non-appearance is owing to a wish to avoid cross-examination, though the Plaintiff has not given very satisfactory evidence as to communications with him. We think, therefore, that if his

C. A. 1883 LANGEN v. TATE. Cotton, L.J.

evidence is relevant and material it would be right to give the Plaintiff an opportunity of examining him. Of course the whole matter will be open until we see the further affidavit. If we give the Plaintiff the power of examining the witness in the *United States*, we must carefully protect the Defendants against suffering from delay. There has been considerable delay, but I do not think the Plaintiff has been altogether responsible for it. Neither party seems very anxious to go on, but the Plaintiff has been guilty of delay, and if we thought it likely that the case could have been heard before the Long Vacation probably we should act differently, but, as far as one can see, there is no probability, even if there is a possibility, of its being disposed of before the Long Vacation.

Therefore I think the Plaintiff should know that if on the further evidence we think it right to grant a commission to examine the witness, it must be on the terms that the Plaintiff undertakes to consent to any application which the Defendants may make in the first week of next sittings, to have the case in the paper in that or the following week. There is this further consideration: it may be that the Plaintiff may succeed in his action, but that nevertheless the Court may at the hearing be satisfied that this evidence was not material even if it was relevant. We are of opinion, therefore, that if the commission goes there ought to be this further term, that the Plaintiff is to give security, to be settled by the Judge in Chambers if the parties differ, to pay to the Defendants all such costs of and occasioned by the commission as the Judge at the trial may think he ought to pay, whatever the result of the action may be. The Plaintiff must, in any event, pay the costs of the appeal up to this time, because he has come here impeaching an order which was a right order, though not for the reason given by the Judge. We give him, as an indulgence, the power of adducing further evidence to remove, if he can, an objection which we think was fatal to him, but he must pay the costs up to the present time, and if he does not bring that further evidence, of course the appeal will be *simpliciter* dismissed with costs. If he does adduce that evidence and we are not satisfied with it, there will of course be the same result, but if we are satisfied with it, then he will have to pay all

C. A.
1883
LANGEN
v.
TATE.

the costs up to the present time, though the order may be different as to the costs of the subsequent hearing. The other side to have the affidavit on or before Tuesday week, and the case to be in the paper on the next day unless they apply to have it postponed.

BOWEN, L.J., concurred.

Solicitors for Plaintiff: *Faithfull & Owen.*
Solicitor for Defendants: *J. H. Johnson.*

H. C. J.

HYMAN *v.* HELM.

[1882 H. 4284.]

C. A.
1883
CHITTY, J.
April 27.
C. A.
July 11.

Practice—Two Actions in One Matter—Cross-Actions—Staying Proceedings—Action by Defendant in Foreign Country.

B., resident in *San Francisco*, brought an action against *C.* in *England* alleging that *C.* had been *B.'s* agent to purchase for him goods in *England*, that *B.* had recently discovered that *C.* had in the accounts rendered charged more for the goods than he had paid for them, and asking for an account against *C.* as agent. *C.*, by his statement of defence denied agency, alleged that he had as principal sold the goods to *B.*, insisted on the accounts rendered as settled accounts, and alleged that a large balance was due. *C.* then commenced an action in *San Francisco* against *B.* to recover the amount which he so alleged to be due. *B.* moved to restrain this action:—

Held, by *Chitty*, J., and by the Court of Appeal, that the action ought not to be restrained, for that there was no *primâ facie* inference that the bringing the action abroad, during the pendency of an action in *England* in which the matters in dispute could be determined, was vexatious, since the course of procedure in *San Francisco* might be such as to give advantages to *C.* of which he was entitled to avail himself, and that the burden lay on *B.* to prove that *C.'s* action was vexatious, which he had failed to do.

THE Plaintiffs, who were merchants carrying on business at *San Francisco*, brought their action in the Chancery Division on the 18th of October, 1882, against the Defendants, who were carrying on business in *Manchester*. The case made by the statement of claim was that the Plaintiffs had since 1875 employed the Defendants as their agents to purchase goods for them on the terms of a letter dated the 6th of July, 1875, which was set out

C. A. 1883 HYMAN v. HELM.

in the statement of claim; that the Plaintiffs had recently discovered that the Defendants had made improper charges in their invoices, and in particular had systematically charged the Plaintiffs with prices higher than those charged by the vendors, and had otherwise made profits at the expense of the Plaintiffs contrary to the terms of their agency. The Plaintiffs claimed an account of the dealings and transactions of the Defendants as agents of the Plaintiffs on such a footing as to charge the Defendants with all profits in excess of those allowed by the terms of the agreement.

The Defendants by their statement of defence, delivered on the 4th of April, 1883, denied that they had acted as the Plaintiffs' agents, and alleged that they had acted as principals in supplying goods to the Plaintiffs; that accounts had been regularly forwarded by the Defendants to the Plaintiffs of the business transactions between them, and had been assented to and acted on by the Plaintiffs, and that such accounts were stated and settled accounts; that the last of such accounts was sent to the Plaintiffs in June, 1882; that the Plaintiffs had assented to and adopted that account, and had since made remittances on account, but that there remained above £2880 due to the Defendants.

About the end of April, 1883, the Defendants commenced their action in *San Francisco* against the Plaintiffs to recover £2884 3*s.*, which the Defendants alleged to be the balance due to them from the Plaintiffs on the transactions between them. The Plaintiffs moved to restrain the Defendants from taking proceedings in *San Francisco*, and offered by their notice of motion to pay the £2884 3*s.* into Court.

The motion was heard before Mr. Justice *Chitty* on the 27th of April, 1883.

Stirling, for the motion:—

The Court has jurisdiction to stay the action. If the Plaintiffs are sued in *San Francisco* they must plead the same matters which are raised by their action here. There would be two actions in respect of the same subject-matter. It is an oppressive litigation which the Court will not sanction. I am willing to pay the money into Court, and to give an undertaking to speed.

He referred to *McHenry* v. *Lewis* (1), *Carron Iron Company* v. *Maclaren* (2) and *Williamson* v. *Barbour* (3).

E. S. Ford, for the Defendants:—

The case of *McHenry* v. *Lewis* is distinct on the point. The Plaintiffs are resident in a foreign country where there are different forms of procedure and different remedies, and a special case must be made out to induce the Court to interfere. We are not bringing an action in this country; we wish to bring our action in the country where the Plaintiffs reside. The litigation is neither vexatious nor oppressive. There is no equity to stay the action.

Stirling, in reply.

CHITTY, J.:—

This is a motion by the Plaintiffs in an action impeaching the accounts between themselves and the Defendants, the Plaintiffs being merchants, and the Defendants being commission agents. It is said on the part of the Plaintiffs that the case is like one which was tried not very long ago in this Court of *Williamson* v. *Barbour*.

The Plaintiffs themselves reside at *San Francisco*. The Defendants are *Manchester* commission agents, and the Defendants, who live here, propose to bring an action in the country where the Plaintiffs themselves reside, that is to to say, in *San Francisco*, and the present motion is for an injunction to restrain them from instituting proceedings there. No special case whatever has been made out. There is nothing in the case beyond the facts which I have already stated, indeed there is no evidence to shew whether the contract which is being sued upon, or proposed to be sued upon, in *San Francisco*, and which is proposed to be made the foundation by the present Defendants of their action, is an English contract, or whether the case will have to be decided in accordance with the law of *England* or that of *San Francisco*, if indeed there be any difference between the two. It is a case without any special circumstances whatever in it.

In *McHenry* v. *Lewis* the Court of Appeal decided that where

(1) 22 Ch. D. 397. (2) 5 H. L. C. 416.
(3) 9 Ch. D. 529.

C. A. 1883 HYMAN v. HELM. Chitty, J.

there are two actions against the same defendant, one here and one in a foreign country, a special case must be made out in order to obtain a stay. It seems to me it is an *à fortiori* case that where the party applying for the stay is himself the plaintiff in the action in this country, and is proposed to be made the defendant in the action in the foreign country, that the rule as to making out a special case must apply. Indeed, if the Defendants in the present action were to commence a cross action in *England* a stay could not be obtained, though no doubt there would be that which is practically equivalent to it upon the Defendants to that action offering the same terms as they as Plaintiffs offer now, viz., to pay the money into Court. On those terms they would get an order for consolidation, but technically they would not get a stay. It appears to me the case is really disposed of by the decision in *McHenry* v. *Lewis* (1), and I cannot set up a *dictum* even of Lord *Cranworth* in the House of Lords (2) as against the decision of the Court of Appeal. I think the motion fails, but inasmuch as the Plaintiffs have offered to bring the amount into Court and to speed the action, and have given security for costs, it appears to me that it has been made *bonâ fide*. I do not see what advantage there will be in the Defendants attempting to try their action in *San Francisco*. The Plaintiffs' position may be different after they have obtained a decree here, but as to that I say nothing. It is said that the Courts in *San Francisco* are more speedy than the Courts in *England*, though that is only said by a *Manchester* merchant who does not appear to have any special experience of the Courts in *San Francisco*. There may be advantages or disadvantages connected with the Courts in *San Francisco*, but about that I know nothing. I think the Plaintiffs have not made out a sufficient case of vexation. They have not made out a special case, and therefore, I must refuse the motion. But as the motion has been made with a view to save expense, I shall make the costs of the motion costs in the action.

G. M.

C. A. The Plaintiffs appealed, and the appeal was heard on the 11th of July, 1883.

(1) 22 Ch. D. 397. (2) 5 H. L. C. 437.

W. Pearson, Q.C., and *Stirling*, for the Appellants:—

This Court has full seisin of the matter, complete justice can be done here, and the action in *San Francisco* is vexatious and oppressive, and ought not to be allowed to proceed. All the witnesses are resident here. If before the *Judicature Act* the Defendants had brought this action in *England* it would have been of course to restrain them.

[BOWEN, L.J.:—Does it follow that an action abroad should be restrained. The mode of procedure abroad may be more favourable to the Defendants. Why are they to be restrained from suing where they please?]

There are several classes of cases, the first being where the party bringing the action abroad resides here and can have his remedy here. The leading case in this branch is *Bushby* v. *Munday* (1). There was a suit to set aside a bond, and the defendant sued in *Scotland* on the bond. The Court restrained him.

[COTTON, L.J.:—There was an equity to set aside the bond.]

There is an equity here. We allege the Defendants to be agents entitled to charge us with no more in respect of the goods than what they paid to the vendors. The case is one of complicated account, and a Court of Common Law cannot give as effectual relief as a Court of Equity; and before the *Judicature Act* the Court of Chancery would have restrained such an action as this in *England*.

[COTTON, L.J.:—You must not take that for granted. The question whether the Defendants were your agents could be tried at common law. If the Defendants failed to prove in their action that they were vendors they could not recover.]

The contract here is an English contract, and best dealt with by an English Court. The case is one in which we are entitled to equitable relief, and it ought to be tried in a Court of Equity. The evidence is all here, and if the case is tried in *San Francisco* witnesses must be examined by commission, which is a very unsatisfactory way of taking evidence, or else they must be taken

(1) 5 Madd. 297.

C. A. 1883 HYMAN v. HELM.

over thither at an enormous expense. We have an equity to have these accounts properly taken, an equity which would restrain the Defendants from bringing an action here except on the terms of having it consolidated with ours. Then there is a class of cases where actions are restrained when the persons bringing them can get the benefit of a judgment here.

[COTTON, L.J.:—That is never done except after judgment.]

The case of *McHenry* v. *Lewis* (1) does not decide the present. The Court there assumed that it had jurisdiction to stay the foreign action, but refused to do so because the plaintiff there could not have the same relief here as in *America*. There were other defendants, and the action in that respect was not the same. The Court therefore would not interfere, because it did not appear that the plaintiff could have the same relief here and against the same parties.

[BRETT, M.R.:—The principle was that by suing abroad he might get some reasonable advantage, and that his trying to get it was not vexatious or oppressive.

COTTON, L.J.:—Is there any case where a defendant sued here has before decree been restrained from commencing an action abroad?]

We believe not, except in the cases where there is an independent equity to stop the action. According, however, to *McHenry* v. *Lewis* and *Peruvian Guano Company* v. *Bockwoldt* (2), an action abroad which is vexatious and oppressive will be restrained, and it is vexatious and oppressive to institute a proceeding for trying a case in *San Francisco* when all the evidence is here, and a litigation is pending in *England* which will settle all matters in dispute.

Romer, Q.C., and *E. S. Ford*, *contrà*, were not called upon.

BRETT, M.R.:—

In this case the Plaintiffs brought an action in the Chancery Division of the High Court against the Defendants, charging that the Defendants were their agents to buy goods for them,

(1) 22 Ch. D. 397.

(2) 23 Ch. D. 225.

and that the Defendants as their agents have sent them in accounts in which they have made fraudulent charges against them, that is to say, that they have not charged their principals for whom they had purchased goods the prices which they gave for the goods, but have charged higher prices. The relief which the Plaintiffs claim is to have an account on the footing of the Defendants having been agents for them. Since the commencement of that action the Defendants have brought an action against the Plaintiffs in *San Francisco*, and an application is now made to the English Court to restrain the Defendants from proceeding further with the action in *San Francisco*. I am clear that no case whatever is made out for such an application, unless we can say that the bringing of the action by the Defendants at *San Francisco* is, under the circumstances, within the rule as to the prevention of the vexatious and oppressive multiplication of actions.

Now it is said that the contract, whatever it was, between the Plaintiffs and the Defendants was an English contract, that the fulfilment of that contract between the Plaintiffs and the Defendants took place in *England*, and that upon the dispute between the Plaintiffs and the Defendants the witnesses will be witnesses in *England*, and thereupon it is said that it is vexatious for the Defendants to bring the action in *San Francisco*. If that makes an action vexatious it would be a ground for the interference of the Court, although there were no action in *England* at all, the ground for alleging the action in *San Francisco* to be vexatious being that it is brought in an inconvenient place. But that is not the sort of vexation on which an English Court can act.

It seems to me that where a party claims this interference of the Court to stop another action between the same parties, it lies upon him to shew to the Court that the multiplicity of actions is vexatious, and that the whole burden of proof lies upon him. He does not satisfy that burden of proof by merely shewing that there is a multiplicity of actions, he must go further. If two actions are brought by the same plaintiff against the same defendant in *England* for the same cause of action, then, as was said in *McHenry* v. *Lewis* (1), and the case of the *Peruvian Guano Company* v.

(1) 22 Ch. D. 397.

C. A. 1883 HYMAN v. HELM. Brett, M.R.

Bockwoldt (1), *primâ facie* that is vexatious, and therefore the party who complains of such a multiplicity of actions has made out a *primâ facie* case for the interference of the Court. Where there is an action by a plaintiff in *England*, and a cross-action by a defendant in *England*, whether that same *primâ facie* case of vexation arises is a much more difficult point to decide, and I am not prepared to say that it does. Whether, however, there may not be vexation and oppression where a defendant in *England*, since the *Judicature Act*, brings a cross-action against the plaintiff instead of bringing the whole case within the one action, is a point on which I will not give any opinion, for it does not arise in the present case. But it was held in the cases which I have mentioned, that even where the plaintiff brings two actions, one in *England*, and the other in a foreign Court, that then the same *primâ facie* case of vexation does not arise, because he might have a reasonable ground for bringing the action abroad, that is to say, it may be of some advantage to him to do so, and if it is of some advantage to him it is not right for the other party to say that the bringing it is vexatious and oppressive as against him. In such a case it lies on the defendant to shew that in fact there is vexation. He would establish that, if he shewed that the plaintiff could get no advantage whatever by the action abroad greater than he could get by the action in *England;* but it is for the party applying to the Court to shew that.

The present case however is not the case of a plaintiff bringing two actions, one here and another in *San Francisco.* The case here is that the Plaintiffs bring an action in *England*, and the Defendants bring an action in *San Francisco* against the Plaintiffs in respect of the same transaction. If the case had been that the Plaintiffs having brought their action here against the Defendants as their agents, the Defendants in *San Francisco* brought an action there as agents for the balance of their account, I give no opinion (because it is not necessary in this case to do so), whether that would have been such a vexatious proceeding as would have caused the Court to interfere. It is not shewn in the present case that the Defendants are suing in *San Francisco* as agents, and the Plaintiffs do not even state that they are doing so.

(1) 23 Ch. D. 225.

So far is that from being the state of things, that, to my mind, the probability, amounting almost to certainty, is that the action in *San Francisco* is not brought by the Defendants against the Plaintiffs on the ground that they were the agents of the Plaintiffs. To bring the action in that form would, as it seems to me, be committing suicide, and I have no doubt that they are bringing an action in *San Francisco* on the ground that they are vendors and not agents. If that be so, and the Plaintiffs' case be true, that the Defendants were not vendors but agents, then, unless we assume that the Court in *San Francisco* is unable or unwilling to administer justice, the only effect of the Defendants bringing that action will be that they will fail and have to pay the costs.

It seems to me that the only ground on which the Plaintiffs could succeed in this application is vexation and oppression on the ground of multiplicity of actions; that the burden of proving that vexation or oppression lies upon them; that they have failed to shew it, and that therefore this application was properly refused by Mr. Justice *Chitty*.

COTTON, L.J:—

The Appellants here seek to restrain the Defendants from going on with an action commenced by them in *San Francisco*, and the application has been put on two grounds: first, that the action ought to be restrained as being vexatious; and, secondly, that there is an equity independently of that for staying the action in *San Francisco*.

Now as regards vexation, in my opinion no case is made out. Where a plaintiff who is bringing an action here brings before another tribunal in this country another action against the same defendant for the same subject-matter, that *primâ facie* is vexatious; and it is a matter of course to put the plaintiff to his election, and to compel him to determine in which suit he will go on; but where the plaintiff has commenced an action in *England* and commences an action for the same purpose against the same defendant in a foreign country, there it is not of course to stop him or to put him to his election, but the Court considers and inquires whether the double proceeding is vexatious on his part, and if the Court comes to the conclusion that it is, then the Court

C. A. 1883 HYMAN v. HELM. Cotton, L.J.

interferes to prevent him from going on with both actions. But here the case is entirely different. Messrs. *Helm*, whose action in *San Francisco* is sought to be stopped, are Defendants in the action in which this appeal is brought, in which action there has been no decree made for taking any account between the parties. If there had been such a decree then the Defendants would have had a right to go on with the prosecution of the decree, and the matter would have stood very much like the case of a plaintiff in *England* going on with an action in a foreign country. Whether in that case the Court would have interfered is another question, but here, as there has been no decree of which the Defendants can claim the benefit, how can it be said that their action is vexatious? No case has been referred to, and I think there is no case where a defendant in an English action in which no decree has been made has been prevented on the ground of vexation from commencing against the plaintiff in *England* an action in a foreign country, though I do not mean to lay down that the Court would never under such circumstances interfere. Before decree the cases of the defendant and the plaintiff are obviously very different. A defendant up to decree has no control in the action except that he can move to dismiss if the plaintiff does not go on; and that being so, why is it vexatious on his part to resort to a foreign tribunal if he thinks he can get more speedy justice there? Can it be said that where he is attacked by the plaintiff in *England* it is vexatious on his part to institute proceedings in a foreign country even in respect of the same matter?

But the case does not rest there, for, as far as I can see, the two actions are on a different footing. The Defendants are suing in *San Francisco* saying, "We are not, as you allege in your English action, your agents. We are vendors to you, and we seek to recover in this action the amount which is due to us as having sold you these goods." How that can be vexatious it is difficult to see. It is said that the evidence is here, but the mere fact that the evidence is here, even if it were the fact, would not make the prosecution of an action there by the Defendants here (who are not actors here) vexatious. It is no ground for bringing over an action commenced in a foreign tribunal to an English tribunal that the evidence is in *England*. It is argued by the Respondents that the

Plaintiffs are in *San Francisco*, and that their books there, or evidence given there, may prove the whole case of the Respondents. But I do not in any way rest my decision on that. If the Court has jurisdiction to restrain an action abroad by a defendant in an English action, a point as to which I give no opinion, it lies upon the plaintiff in the English action to make out that the action by the defendant is vexatious, and that in my opinion the Appellants in the present case have entirely failed to do.

Then it is said that independently of vexation there is an equity to stop this action independently of the question which action was commenced first. Now what are the positions of the two parties? Messrs. *Helm* say we were vendors, and we bring an action for the price of goods sold. Messrs. *Hyman* say you are our agents, and we are going to get an account against you in the English suit. Now, undoubtedly, that is a case in which a Court of Equity in former days would have entertained jurisdiction and could have granted a decree for an account, but would there before decree be an equity to stop the action? The right to sue in equity is grounded on agency, and there would be no right to relief in equity unless the case of the plaintiff at law was false. I see therefore no reason why the plaintiff at law, the person who alleged that he was the vendor, should be prevented from going on with his common law claim and establishing it in the common law action. If he established it there was an end of the case of the plaintiff in equity. The case is not like a case where assuming the plaintiff at law has a good case at law there is still an equity to be tried which would make it right to stay the proceedings at law on the plaintiff in equity submitting to judgment to be dealt with as the Court should direct.

In my opinion here there is no equity independent of the suggested vexation (which I have disposed of) which entitles the Plaintiffs to get an injunction to restrain the Defendants from going on with their action. If there were such an equity the fact that the action of Messrs. *Helm* is in a foreign country would not of course in any way prevent the English Court from restraining them from proceeding with it, for the Court would not be acting against the foreign tribunal, but simply acting against the person. That was all that was decided in

C. A. 1883 HYMAN v. HELM.

Bushby v. *Munday* (1). There was in that case an equity to restrain the prosecution of an action if it had been begun in *England* in a Common Law Court, and therefore the Court, on the ground of the equity, interfered against the defendant, even although the action which he had brought was before a foreign tribunal. In my opinion the appeal fails, and must be dismissed.

BOWEN, L.J.:—

I am of the same opinion. The Plaintiffs in this case are suing the Defendants in the Chancery Division as agents, and seeking to open their accounts on the ground of fraudulent transactions on the part of the agents. The Defendants then bring an action in *San Francisco* against the Plaintiffs, but on a different ground, viz., on the ground that they are vendors and have sold and delivered goods to the Plaintiffs in this action who are the Defendants in *San Francisco*. The Plaintiffs in this action apply to us to restrain the Defendants from becoming the actors in *San Francisco* in the action which they have brought there.

Now certainly this is a very novel application made by the Plaintiffs here against the Defendants before decree to prevent the Defendants from taking what they consider to be a step for their advantage and becoming actors in a foreign country, raising a different case from that which is raised in the action here. First of all the question is, whether there is any equitable ground for interference with this step which the Defendants have taken. I do not say that if the Defendants by that step could escape from an equity from which they could not escape if their counter-claim or cross-claim was to be decided here, and which was an equity that ought to bind them here and everywhere, a Court of Equity could not restrain them from changing the forum in order to escape from justice and from equity. It is much better not to decide such a point either way when it is not necessary to decide it. But in this particular instance there seems to me to be no such equity. The claim of the Defendants that they are seeking to enforce is a claim for goods sold and delivered. What equity is there which could compel a man to abstain from

(1) 5 Madd. 297.

prosecuting that kind of action at common law in this country, because, if there is none, I cannot see that there would be any equity to prevent him from prosecuting such a claim abroad.

It is said that the Plaintiffs' case is a case of fraudulent agency and of an account which ought to be reopened on the ground of fraud. That is the Plaintiffs' case, but it is not an equity which attaches to the Defendants' case. If the Defendants' case is true they are vendors of goods, and there is no equity attaching to their case. The equity only comes into play if the Defendants' case is untrue. There is, therefore, no equity of the kind which Mr. *Pearson* has put forward.

Then is it vexatious that the Defendants here should seek to become Plaintiffs in *San Francisco?* Before the *Judicature Act* I presume it certainly was an unheard of thing for a plaintiff to complain that a defendant was taking independent proceedings. Of course there was before the *Judicature Act* an obvious advantage to a man in becoming an actor instead of being a passive defendant. I am not prepared to say that matters are on quite the same footing since the *Judicature Act.* It is not necessary to decide it. I am not quite sure whether a counter-claimant before decree since the *Judicature Act* is not an actor to some extent, and in such a sense that it might be vexatious in him both to prosecute his counter-claim here, and to prosecute the same case by independent action elsewhere. I am ready, therefore, to assume for the purpose of the argument, but for the purpose of the argument only, that the Defendants in the action here may be treated for the purpose of Mr. *Pearson's* argument as if they were actors. But supposing them to be so, what is there to shew that they are doing anything vexatious in prosecuting their claim abroad. The first thing Mr. *Pearson* says is that the contract was made in *England,* and the witnesses are all in *England.* But that is no reason. The Plaintiffs themselves in the Chancery action live in *San Francisco.* The Plaintiffs there may wish to sue them in their own country. But, says Mr. *Pearson,* you can get execution here as well as you can get it anywhere else, and we will bring the money into Court. But that does not cover the whole ground. A man may wish to sue abroad as well as in *England,* both because he has superior facility of execution

C. A. 1883 HYMAN v. HELM. Bowen, L.J.

abroad, and also because of superior facility of procedure before judgment. And even if the money is brought into Court here it does not follow that the Defendants by bringing their action in *San Francisco* may not have their claim determined more speedily, more cheaply, and more easily, and with more advantage to themselves. They know best. I think it lies on the persons who wish to put an end to concurrent litigation here and abroad to make out a case of oppression. It is not enough simply to say why should the action go on in two places at the same time? The answer is, an English Court cannot judge by the light of nature. We do not know; we are perfectly unable to judge, except on materials properly before us for the purpose, what is the nature of the proceedings in the foreign Court, or what advantage a man gets by suing abroad over what he gets by coming here. I think it lies on the person who wishes to stop a foreign litigation to make out a clear case. The present case, putting aside the question of independent equity, appears to be simply the converse of the *Peruvian Guano Company* v. *Bockwoldt* (1). I am not sure that we have a right to treat this as if the Defendants in the Chancery suit were subject to all the disabilities to which they would be subject if they were the Plaintiffs in a suit in this country, and after they had elected to come within the jurisdiction here, had tried another jurisdiction at the same time, but even assuming that they were, I think, applying the rule in that case, and in *McHenry* v. *Lewis* (2), to Mr. *Pearson's* clients, that he has not shewn us that the opposite party may not get some real advantage by doing what they are doing.

Solicitors for Plaintiffs: *Barnes & Bernard.*
Solicitors for Defendants: *Phelps, Sidgwick & Biddle.*

(1) 23 Ch. D. 225. (2) 22 Ch. D. 397.

H. C. J.

GREER *v.* YOUNG.

[1874 G. 124.]

C. A.
1882
CHITTY, J.
Nov. 13.
C. A.
1883
July 10, 13.

Considered. WIM BOURNE *v.* FINE [1952] 1 Ch. 86

*Solicitor—Lien—*23 & 24 *Vict. c.* 127, *s.* 28 [*Revised Ed. Statutes, vol. xiii. p.* 881] *—Property recovered or preserved—Property of Person not employing the Solicitor—Property of Infant.*

The charge declared in pursuance of the 28th section of the *Solicitors' Act*, 1860, on the property recovered or preserved in favour of the solicitor employed is in the nature of salvage, and may be made on the interest of persons who did not employ the solicitor and who were not parties to the suit, if they adopt the benefit obtained in the suit.

It makes no difference that the persons whose interests are charged are infants, but the Court will not make the order until the infants have an opportunity of being heard on it.

P. and *Y.* were trustees under the will of *G.* *P.* misapplied some of the trust funds and died. The suit of *M.* v. *P.* was brought for the administration of *P.*'s estate, and a proof was carried in by *Y.* on behalf of the trust in respect of the breaches of trust by *P.* Afterwards the action of *G.* v. *Y.* was brought by some of the *cestuis que trust* under *G.*'s will to establish the liability of *Y.* and to appoint new trustees, in which a small dividend was recovered from *Y.*'s estate. The solicitor who acted for the Plaintiffs in *G.* v. *Y.* applied for a charging order for his costs on the dividend recovered from *P.*'s and *Y.*'s estates, which was opposed by the new trustees on behalf of the infant *cestuis que trust*:—

Held, that the solicitor was entitled to a charge upon the dividend recovered in the action from *Y.*'s estate as against the infant *cestuis que trust*, but not on the dividend recovered from *P.*'s estate, as it was not recovered in the action.

W. J. GREER, by his will, dated the 4th of August, 1863, gave his residuary personal estate to *Francis Young* and *A. A. Pollock* upon trust to pay an annuity of £250 to his widow during her life, and subject thereto to pay the income to his daughter, Mrs. *Napper*, during her life for her separate use, and after her death to her husband during his life, and after the death of the survivor upon trust for the children of his daughter as therein mentioned.

The testator died in 1863 soon after the execution of the will.

Mr. *A. A. Pollock* was a solicitor, and managed the administration of the testator's estate. He died suddenly in 1873, and it was then discovered that he had committed breaches of trust

C. A. 1883

GREER v. YOUNG.

by which a considerable part of the testator's estate had been lost.

In September, 1873, the suit of *Middleton* v. *Pollock* was instituted for the administration of *Pollock's* estate, and claims were carried in to an amount far exceeding his assets.

A claim was carried in by *F. Young* on behalf of *W. J. Greer's* estate for £3419.

In the year 1874 the present action was commenced by the widow of *W. J. Greer* and Mrs. *Napper*, his daughter, against *F. Young* and *Caroline Pollock*, the administratrix of *Pollock*, praying a declaration that the Defendant *Young* and the estate of *Pollock* were jointly and severally liable to make good to the beneficiaries under the will of *W. J. Greer* all loss occasioned by *Pollock's* breach of trust, and that new trustees might be appointed of the will. Mr. *Napper* was made a party Defendant. Mr. and Mrs. *Napper* had some children who were infants, but they were not parties.

On the 11th of February, 1876, a judgment was pronounced in the action, by which it was declared that the Defendant *Young* and the estate of *Pollock* were jointly and severally liable to make good the sum of £3419, part of the estate of *W. J. Greer*, and that such estate was entitled to the benefit of the proof carried in by *F. Young* in the suit of *Middleton* v. *Pollock*; that *Young* should pay the sum named into Court; that the Defendants should pay the costs of the suit, and that two new trustees should be appointed.

In pursuance of this judgment Messrs. *Fanshawe & Harper* were appointed trustees by the Court.

The costs of the action of *Greer* v. *Young* up to the judgment amounted to £194 10*s.* 9*d.* The solicitors who conducted the action were originally Messrs. *Wilkins & Blyth*, and afterwards Messrs. *Wilkins, Blyth, & Fanshawe*, and eventually Mr. *Blyth* alone, both his partners having retired.

The Defendant *Young* never paid anything into Court, and soon afterwards became bankrupt, and his trustee in bankruptcy was joined as a Defendant.

Fanshawe & Harper, the new trustees, received a dividend on the sum of £3419 in *Middleton* v. *Pollock*, and also a small dividend

in *Young's* bankruptcy. The money so received, amounting to £1035, was still in the hands of *Fanshawe & Harper*.

Mr. *Blyth* took out a summons in *Greer* v. *Young* asking for a charging order on the dividend received by *Fanshawe & Harper*, and on all dividends which might be received by them in *Middleton* v. *Pollock*, and in the bankruptcy of *Young*, for his costs in *Greer* v. *Young*, amounting to about £254.

An order was made by Mr. Justice *Chitty* in Chambers granting the charging order. The trustees then moved to discharge the order. The motion was heard before Mr. Justice *Chitty* on the 13th of November, 1882.

Underhill, for the trustees, contended that the charging order, if made at all, should only extend to the interests of the Plaintiffs in *Greer* v. *Young*. They cited *Bulley* v. *Bulley* (1); *Berrie* v. *Howitt* (2); *Lloyd* v. *Jones* (3); *Emden* v. *Carte* (4).

Warrington, for the solicitor, cited *Pinkerton* v. *Easton* (5); *Faithfull* v. *Ewen* (6); *Scholefield* v. *Lockwood* (7); *Bailey* v. *Birchall* (8); *In re Keane* (9); *Twynam* v. *Porter* (10).

CHITTY, J.:—

This is a motion to discharge an order made in Chambers by which a charge was given to a solicitor for his costs incurred in this action, which is for the recovery of a trust fund.

The case was scarcely argued in Chambers, and the point which has now been raised at the Bar by counsel on behalf of the moving parties was not raised before me in Chambers.

The facts are very short. The tenant for life of a trust fund, and an annuitant having a charge on the fund, instituted an action against the administratrix of one of the trustees who had died, and, in the result, against the trustee in bankruptcy of the other trustee, who had become bankrupt, to recover the trust

(1) 8 Ch. D. 479.
(2) Law Rep. 9 Eq. 1.
(3) 27 W. R. 655.
(4) 19 Ch. D. 311.
(5) Law Rep. 16 Eq. 490.
(6) 7 Ch. D. 495.
(7) Law Rep. 7 Eq. 83.
(8) 2 H. & M. 371.
(9) Law Rep. 12 Eq. 115.
(10) Ibid. 11 Eq. 181.

C. A. 1883 GREER v. YOUNG. Chitty, J.

fund which had been lost through an alleged breach of trust; and the action resulted in a judgment being pronounced by the Master of the Rolls, by which it was declared that the breach of trust had been established, and it was decided that the Plaintiffs were entitled to the benefit of a proof carried in by the surviving trustee against the estate of the deceased trustee which was being administered in another action, and new trustees were appointed. This was an action, therefore, to recover the trust property, and not merely to secure the interests of the tenant for life and the annuitant in the property. One of the original trustees was dead, and the other was removed from the trust, and new trustees have been appointed in their places who are entitled to receive a considerable sum out of the estate of the deceased trustee, and are also entitled to recover what they can get from the estate of the bankrupt trustee. The first point raised is that the charge ought to be confined to the interests of the Plaintiffs in this action. The 28th section of the *Solicitors' Act*, 23 & 24 Vict. c. 127, enables me to declare that the Plaintiffs' solicitor is entitled to a charge for his taxed costs on the property recovered or preserved. Apart from decision, I have no doubt whatever that this action having resulted in the recovery of property, the solicitor employed in prosecuting the action ought to have a charge on the property for his costs. The property recovered ought to be apportioned between the tenant for life and the remainderman; if recovered in the shape of dividend it must be apportioned as between *corpus* and income according to the well-known authorities on this subject. Upon this question it appears to me that at the present day there cannot be any doubt.

In *Bulley* v. *Bulley* (1) the Master of the Rolls and Lord Justice *Cotton* evidently considered that the *Solicitors Act* authorized a charge for the solicitor's costs on the property recovered or preserved in an action although the client might have only a partial interest.

In *Bailey* v. *Birchall* (2) Lord *Hatherley* went so far as to give a charge to a solicitor although his client had no interest whatever in the property; and Vice-Chancellor *Bacon* took the same

(1) 8 Ch. D. 479. (2) 2 H. & M. 371.

view of the Act in *Twynam* v. *Porter* (1). The only authority the other way is in *In re Keane* (2), where Vice-Chancellor *Wickens* did not give the solicitor a charge upon the whole property, but only upon his client's interest in it. That, however, was a peculiar case, as has been explained in a later authority. In *Bulley* v. *Bulley* (3) the Master of the Rolls doubts the soundness of that decision, and goes on to say, "but supposing it correct, it merely turns on the fact of the estate having been an estate tail, the owner of which died after the suit and before the charging order was applied for."

That a liberal construction of the Act should be adopted is clear from the judgment of the late Master of the Rolls in *Scholefield* v. *Lockwood* (4), and of Lord *Selborne*, sitting for the Master of the Rolls, in *Pinkerton* v. *Easton* (5). I therefore think the Court is correct in charging in the present case the property itself.

Another point raised was that the parties beneficially entitled in remainder are not parties to this action. That, in my opinion, is quite immaterial. The fund has been recovered for their benefit.

Another point raised was that the trustees against whom the charging order was asked for were not formally made parties to the action. That also appears to me to be immaterial. The Act says nothing about parties; it only requires that the order should be made by the Judge before whom the action is heard. However, the trustees now appear by counsel; and with reference to the remaindermen, in my opinion the general rule applies that trustees properly represent their beneficiaries, because the trustees of a fund are *primâ facie* the proper persons to protect it.

A point to which I called counsel's attention was that the order had not been so drawn as to limit, as it ought to have done, the costs of the solicitor to his costs properly incurred in recovering and preserving the property.

The order should now be amended in that respect.

His Lordship then made an order that the late firms of

(1) Law Rep. 11 Eq. 181.
(2) Ibid. 12 Eq. 115.
(3) 8 Ch. D. 479, 488.
(4) Law Rep. 7 Eq. 83.
(5) Law Rep. 16 Eq. 490.

C. A. 1883 GREER v. YOUNG. Chitty, J.

Wilkins & Blyth, and *Wilkins, Blyth, & Fanshawe*, as solicitors for the Plaintiffs, were entitled to a charge upon all funds recovered in the suit of *Greer* v. *Young*, including the dividends which had or might have been payable to the trustees *Fanshawe* and *Harper* under the proof in the suit of *Middleton* v. *Pollock*, and in the bankruptcy proceedings of the Defendant *Young*, for the costs as between solicitor and client properly incurred in the recovery of the trust funds by means of this suit, and that the trustees should pay the costs when taxed out of the sum of £1035 in their hands.

G. I. F. C.

C. A.

From this decision the trustees appealed. The appeal came on for hearing on the 10th of July, 1883.

Whitehorne, Q.C., and *Underhill*, for the Appellants:—

The Judge had no jurisdiction to make this order. In the first place the Act only gives power to make a charge on the property of the person who employs the solicitor. In this case the parties whose interests are affected by the order are infants who were not parties to the action at all. It is true that they are now represented by the trustees, and by them oppose this order. But the solicitor for the Plaintiffs in *Greer* v. *Young* did not appear for the infants, nor could he have been employed by them, for an infant cannot retain a solicitor. If the infant comes of age he may repudiate the suit. If he takes the benefit of it, I admit that an order can be then made, but that cannot be done till he comes of age: *Berrie* v. *Howitt* (1); *In re Keane* (2); *Bonser* v. *Bradshaw* (3); *Pritchard* v. *Roberts* (4); *Baile* v. *Baile* (5); *Twynam* v. *Porter* (6); *Emden* v. *Carte* (7); *Bulley* v. *Bulley* (8); *Pinkerton* v. *Easton* (9).

In the second place the property now in question was not recovered in the action of *Greer* v. *Young*, in which the solicitor was employed. That action was simply to enforce the liability

(1) Law Rep. 9 Eq. 1.
(2) Ibid. 12 Eq. 115.
(3) 30 L. J. (Ch.) 159; S. C. 4 Giff. 260.
(4) Law Rep. 17 Eq. 222.
(5) Law Rep. 13 Eq. 497.
(6) Ibid. 11 Eq. 181.
(7) 19 Ch. D. 311.
(8) 8 Ch. D. 479.
(9) Law Rep. 16 Eq. 490.

of *Young*, and did not assist in recovering the dividend from *Pollock's* estate, which is the substantial part of the property recovered: *Scholefield* v. *Lockwood* (1); *Bailey* v. *Birchall* (2).

Warrington, for Mr. *Blyth*, was only called on with respect to the second point:—

The action of *Greer* v. *Young* was instrumental in recovering the fund. New trustees were appointed in it. If they had not been appointed the dividend from *Pollock's* estate would not have come into the right hands, and might have been lost. It was preserved if it was not recovered. At all events the action was necessary to establish the liability of *Young*, and to secure the dividends payable out of his estate: *Catlow* v. *Catlow* (3) is strongly in our favour.

BRETT, M.R.:—

In this case *Young* and *Pollock* were joint trustees under Mr. *Greer's* will. *Pollock* was guilty of certain breaches of trust by which the trust property was lost except such part as might be recovered by a dividend from *Pollock's* estate or from *Young's* estate, who, though not morally guilty of the breaches of trust, was legally liable as if he had been guilty himself. An action was brought by the testator's wife and daughter, which was conducted by the solicitor who makes this application for relief against *Young* in respect of the breaches of trust for which he was liable. The relief in that action could be only a decree to make good the loss out of *Young's* estate. No decree in that action could have any effect in getting dividends out of *Pollock's* estate. The dividends out of *Pollock's* estate could be recovered whether this action had been brought or not. The decree in the action of *Greer* v. *Young* would be for the benefit of the infants entitled in remainder under Mr. *Greer's* will, who were infants when the action was brought and are still infants. Under these circumstances the solicitor in that action applies to this Court to make a charging order on the property recovered by his exertions, and he has obtained an order to charge what was recovered not only from *Young's* estate,

(1) Law Rep. 7 Eq. 83. (2) 2 H. & M. 371. 11 Jur. N.S. 57.
(3) 2 C. P. D. 362.

C. A. 1883 GREER v. YOUNG. Brett, M.R.

but from *Pollock's* estate also. The question is whether that order can be sustained. It was argued in the first place, very elaborately, that assuming that the dividend out of *Pollock's* estate had been recovered in this action, and the infant would get the benefit of it, no charging order could be made because the fund would go to an infant. It was argued that the solicitor must be actually employed by the person whose property is charged, and that an infant's estate cannot be charged because he cannot employ a solicitor. On the other hand it was admitted that although the infant did not employ the solicitor, yet if the solicitor recovers the fund and the infant on coming of age elects to take the benefit of it the order might be made. The question depends on the construction of the *Solicitors Act.* I take the view which Vice-Chancellor *Bacon* expressed in *Bulley* v. *Bulley* (1), that the charge is in the nature of salvage. I do not adopt the idea of salvage as an accurate analogy in all respects, but I think the fundamental theory is, that what is recovered by the action of the solicitor is to be treated as if he had earned salvage, and that he is to be paid for his services on the theory that salvage services have been rendered. In *Pinkerton* v. *Easton* (2) Lord *Selborne,* L.C., without using the word "salvage," uses all the expressions that describe the theory of salvage. He says: "Here the Legislature have given, not a charge, but a power to the Court to create a charge, for a solicitor's costs upon 'property recovered or preserved' when meritorious services of the solicitor have resulted in such recovery or preservation." You could not more correctly describe salvage. It does not depend on contract, contract does away with the notion of salvage. Therefore it is immaterial whether the property belongs to an infant: it is immaterial whether the person whose property is recovered employed the solicitor. The Act does not allow the solicitor to be a mere volunteer, but it is sufficient that he should be *bonâ fide* employed by some person interested. He must be a solicitor —there is nothing in the Act which says that he must be the solicitor of the person whose property is preserved—and it must be by reason of the employment that the property is preserved for somebody; in that case the statute gives power to the Court

(1) 8 Ch. D. 479. (2) Law Rep. 16 Eq. 490, 492.

to give him a charge. It is difficult to imagine property being recovered by a solicitor, unless he is in some way employed in the suit. Whether it is recovered in any particular suit is a question of fact, not such a question as would be submitted to a jury, but depending on a question of law which the judge must decide. But where the Court comes to the conclusion that the property was recovered in the suit, it is no objection that the solicitor was not employed by the person whose property was recovered or that that person could not have employed the solicitor.

Therefore, it appears to me that the fact that the person whose property is charged is an infant affords no objection to the order. I do not think that the Court would make such an order without the infant being properly represented when the order is applied for. In the present case the infants were represented by their trustees, and were heard in opposition to the order.

Assuming that infancy is no objection to the order, are we prepared to say in this case that this solicitor was at all instrumental in recovering or preserving the fund which has been recovered from *Pollock's* estate. The suit could only result in obtaining a dividend from *Young's* estate. So far, the suit was the engine by which the dividend was recovered. But it is not within the bounds of propriety to say that any part of *Pollock's* estate has been recovered by means of the suit against *Young*. It is suggested that this has been done by appointing new trustees, which was done in *Greer* v. *Young*. If it could have been shewn that *Young* had been fraudulent, and that by his removal from the trust the funds had been prevented from coming into his hands where they might have been misapplied, I am not prepared to say that the property might not be said to be preserved in this action. But *Young* was not fraudulent, and no one says that if the dividend from *Pollock's* estate had been paid to him he would have misapplied it. Therefore nothing was recovered or preserved by removing *Young* from the trust.

On this ground, therefore, I think that this order cannot be maintained. So far as it charges any dividend from *Pollock's* estate, it must be set aside. If any part is to stand it can only be the charge on the dividend from *Young's* estate. But that

C. A. 1883

GREER v. YOUNG.

Brett, M.R.

portion of the order is so small that the appeal has substantially succeeded, and the Appellants must have the costs of the appeal.

With respect to *Catlow* v. *Catlow* (1), it is not necessary to express an opinion whether the decision was correct or not. It is immaterial with relation to the present case. The decision had reference to the particular facts in that case, and is no authority for any general proposition.

COTTON, L.J. :—

The substantial point in this case relates to the charge on the dividend out of *Pollock's* estate. The 28th section of the *Solicitors Act* gives power to the Court to make a charge in favour of a solicitor on the property recovered or preserved by him. It cannot, in my opinion, be properly said that this fund which was recovered from *Pollock's* estate has been in any way recovered or preserved in the present action. Before this action a proof had been carried in by *Young* against the estate, and under that proof all this dividend would have been recovered without the action. It has been suggested that the fund might have got into the hands of a person who might have misapplied it, and therefore this suit was necessary for the purpose of appointing new trustees, and that in that way the fund was preserved. That is a fallacy. If it had been proved that *Young* intended to misapply the fund, it might have been said that it had been preserved by means of this action. But there is no evidence of any such intention. The suit was commenced with a different object, and I do not say it was improperly instituted. But as the proof against *Pollock's* estate was carried in before the commencement of this action, and no loss was saved by this action, I am of opinion that the fund was not recovered or preserved in this action within the meaning of the section of the Act of Parliament.

There is another fund, namely, the dividend from *Young's* estate, and if anything is recovered from this, it will be recovered in this action. It was necessary that *Young's* liability should be established, which was done by this action, and therefore anything which may be obtained from his estate by way of dividend, may be properly said to be property recovered in this action.

(1) 2 C. P. D. 362.

Then we come to another point, which was much argued by Mr. *Whitehorne*, but which can only apply to this small part of the trust funds, and therefore is not of substantial importance.

The argument on this objection took two lines. First, it was said, that there was no power to charge any property except the property of the person who had employed the solicitor. But that is contrary to the words of the section, which does not say "upon the property of the person who employed him," but "upon the property recovered or preserved." Undoubtedly the quantum of the interest of the person who employed the solicitor is an important element of consideration. It is, generally speaking, the interest of the plaintiff or of the defendant which is recovered in the action, and to determine whether a fund has been recovered in the action, it is material to consider what is the interest of the plaintiff, or defendant. But to say that the Court has only power to charge the interest of the plaintiff or the defendant would be to repeal the Act. It was suggested that there is a danger of encouraging strangers to bring actions respecting the property of others, in which they have themselves no interest, with a view of obtaining a charge upon it for the costs. But I have yet to learn that a stranger can bring an action for property in which he has no interest, and if he has merely a small interest, it will be for the Court to decide whether he has such an interest as will justify a charge being made.

It was contended in the second place that in the present case the property belongs to an infant, and therefore a charge cannot be made on it. I fail to see the force of this objection. It is not unusual to direct costs to be paid out of a fund in which infants, and even unborn infants, are interested. A good deal of the argument turned upon cases where it was held that a solicitor who acts for an infant in a suit is not really employed by the infant. It may be so, but that has nothing to do with the present question. The solicitor in this case was employed properly in the suit, and the only question is not by whom he was employed, but whether he recovered the property and whether it is right for that reason to give him a charge on it. Therefore, the fact of the person to whom the property belongs being an infant does not make any difference. I agree that the infant ought to be

C. A. 1883 GREER v. YOUNG.

heard before the order is made. But here the infants are represented, and the objections to the application have been argued on their behalf. The result is that the solicitor is entitled to a charge on any dividend that may be recovered from *Young's* estate, but not on the rest of the property.

BOWEN, L.J.:—

I am of the same opinion. I agree that the charge can only be made on the dividend from *Young's* estate. The dividend recovered from *Pollock's* estate is not within the section. It does not help us to consider other cases and other actions the facts of which are different from those before us, but I wish to say a few words on this section of the Act, for although it concerns only a small part of the order appealed from, yet it is necessary to put a construction on the section. The difficulty in Mr. *Whitehorne's* way is a broad one. He reads words into the Act which are not there. If the words are read in a natural sense they mean that a charge can be made on the property of an infant whether the infant had anything to do with the action or not, and whether he employed any solicitor in it or not. The section is a very general one. It applies to every case in which a solicitor is employed. It authorizes a charge not on the mere interest of the plaintiff but on all property recovered in the action whatever, for the plaintiff only, or for him in connection with others. It appears clear to me that it is a salvage section. The solicitor is treated as a salvor who has recovered or preserved something in a time of danger by his work and labour. Into whatever hands it may fall it is charged with the salvage. Mr. *Whitehorne* argued that because an infant is not bound by the engagement of the solicitor the charge cannot affect him. But it is not necessary that the property charged should belong to the same person as employed the solicitor. What reason is there why property recovered for the benefit of a remainderman should not be charged simply because he was not a party to the action? It may be that he could not be made a party: he may have had no knowledge of the suit, or he may have had no power to interfere with the prosecution of the plaintiff's rights. Still if the property is recovered for him by means of the action there is nothing in the

section which precludes the Court from making a salvage charge on it. If that be so, if the remainderman can be bound, it seems to follow that the charge will bind property in the hands of an infant. If being an adult he could not have prevented the imposition of the charge, I do not see for what reason he should not be bound because he is an infant.

Two further points ought to be noticed. In the first place the Act gives a discretionary power to the Court; the solicitor has no absolute right to the charge, but only power to ask the Court in the exercise of its discretion to make the charge.

In the second place the person against whose property the order is made should have the opportunity of being heard in opposition to it at some time or other. It is not necessary to decide at what time this may be done: for here the infants were heard before the order was made. I am therefore of opinion that the order, so far as it related to *Young's* estate, was within the statute, and must stand. So far as it related to *Pollock's* estate it was not within the statute. I agree that as the Appellants succeed in the substantial part of the appeal they are entitled to the costs of the appeal.

I do not think that it is necessary to discuss at length the decisions which have been referred to. I think the general current of them is in favour of the liberal construction, treating the solicitor as a salvor. *Bulley* v. *Bulley* (1) and *Pinkerton* v. *Easton* (2) are in favour of this construction.

Solicitors: *F. Dutton; Wilkins & Fanshawe.*

(1) 8 Ch. D. 479. (2) Law Rep. 16 Eq. 490.

M. W.

V.-C. B.

1883

March 21, 22.

THOMAS *v.* WILLIAMS.

[1881 T. 973.]

Tenant for Life—Power of Sale—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 3, 53—*Appointment of New Trustee—Pending Action.*

Independently of the cumulative powers of sale given to tenants for life by the *Settled Land Act*, 1882, the tenant for life, and the trustees under a will which gives them power to sell the estate at the request and by the direction of the person or persons for the time being entitled to the actual freehold of the devised property, will not be restrained from selling the estate at the request and for the benefit of the tenant for life on merely speculative evidence adduced by the remainderman objecting to an immediate sale, of an expected future increase in the value of the property from the development of coal mines, and the construction of a railway through the estate.

THIS was an action by remaindermen for the purpose of restraining a sale of settled property by the trustee, at the request and by the direction of the tenant for life.

Henry Llewellin, by his will, dated the 28th of November, 1836, devised his freehold and copyhold hereditaments, consisting of a mansion-house, farm, and 630 acres in the county of *Glamorgan*, to the use of his nephew, the Defendant, *Edward T. Llewellin*, and his assigns during his life, with remainder to the use of trustees and their heirs during the life of *E. T. Llewellin*, in trust for *E. T. Llewellin*, and his assigns, and to support the contingent uses and estates, with remainders over, under which the Plaintiffs were interested. The will contained a proviso that it should be lawful for the trustees, and the survivor of them, and the executor or executors of such survivor, at any time or times at the request and by the direction of the person or persons who, by virtue of the limitations aforesaid, should for the time being be entitled to the actual freehold of the devised estates, or any part thereof, if such person or persons should have then attained twenty-one, but if such person or persons should not have attained such age, then at the request and by the direction of his, her, or their guardian or guardians, &c., to dispose of and convey, either by way of actual sale, or in exchange for or in lieu of other hereditaments, all or any part of the testator's said real estates, and the inheritance

thereof, in fee simple to any person or persons for such price or prices in money, or for such equivalent or recompense in lands or hereditaments, as to the trustees or the survivor, or the executors or administrators of such survivor, should seem reasonable. And the testator directed and declared that when all or any part of his real estates should be sold for a valuable consideration in money, the trustees and the survivor, and the executors and administrators of such survivor, should with all convenient speed, with such consent as aforesaid, invest the proceeds in the purchase of other hereditaments in fee simple in possession to be settled on the same uses as were in the will contained. Until the money arising by such sale, or to be received for equality of exchange, should be thus disposed of, it should be lawful for the trustees, &c., with the consent and approbation of the persons respectively entitled for the time being as aforesaid, or of their respective guardians during their respective minorities, to invest such moneys either in the parliamentary stocks or public funds, or upon good real securities in *England* or *Wales*. And the will contained a power of appointing new trustees exercisable by the person or persons who should, by virtue of the limitations aforesaid, be for the time being entitled to the actual possession, or to the rents, issues, and profits of the testator's real estates, when of full age.

The testator died in 1838, since which time the Defendant, *E. T. Llewellin*, a widower without issue, and now upwards of eighty years old, had been in possession of the devised property.

In January, 1881, the Plaintiffs received a letter from the surviving trustee stating that *E. T. Llewellin* intended to sell the devised estates by auction and to invest the proceeds in consols; that there was no intention to purchase other lands or exchange, and that it was expected that the sale would give Mr. *Llewellin* an increased income.

After some correspondence, in the course of which the Plaintiffs, besides objecting to the proposed sale, pressed for the appointment of a new trustee, Mr. *Llewellin's* solicitor stated that unless his client was reimbursed the sum of £1000 which he had laid out in repairs and improvements during his tenancy, he would sell the property for the purpose of investing in consols.

V.-C. B. 1883 THOMAS v. WILLIAMS.

In these circumstances the Plaintiffs, as the remaindermen, had brought this action claiming the appointment of a new trustee, and to restrain the surviving trustee from selling at the request and by the direction of the tenant for life, alleging, and adducing evidence for the purpose of shewing, that a sale of the estate was quite unnecessary and would be very prejudicial to the remaindermen; that the estate contained valuable minerals connected with the *Rhondda* and *Aberdare* coal seams, the development of which had only quite recently commenced; that a railway was now in course of construction by the *Taff Vale Company* which would pass within half-a-mile of the property, and that another scheme for a line intended to pass through the estate was now before Parliament, and that when these railways were finished the value of the property, a large portion of which was available for building purposes, would be very materially affected, while, independently of any railway in course of construction or proposed, the value of the estate as a mineral property would undoubtedly increase if a sale were postponed, and especially if the property were sold as a whole, surface and minerals, and not separately. The Plaintiffs also stated that they wished to keep the estate in the family, while the Defendants' object in selling was, as they admitted, solely to benefit the tenant for life without regard to the interests of the remaindermen.

The Defendants insisted that they were acting within their powers, and that a sale of the estate would not be prejudicial to the remaindermen (it being intended on any sale to reserve the mines and minerals). They also adduced evidence for the purpose of shewing that there was no prospect of the value of the land being increased by the construction of a railway, and that the estate, which, in the opinion of the witnesses, would sell exceedingly well just now, was not likely to realize more if a sale were postponed: on the contrary, there was every prospect of the value becoming depreciated. They also stated that it was intended, if the estate were sold, to invest the purchase-money in the purchase of another estate more beneficial both to tenant for life and remaindermen, though no particular estate was in contemplation. The tenant for life, who stated that he should be benefited by a sale of the estate, and that he did not think that it would do the

remaindermen any harm, admitted in his evidence given in Court that if the estate was his own absolutely he would not sell it, but that as tenant for life he would.

Since the commencement of the action, and a few days before the trial, the Defendant *Llewellin*, without referring the appointment to the Court, had appointed a new trustee in the room of *Evan Williams*, one of the original trustees named in the will, who died in 1878.

Hemming, Q.C., and *Christopher James*, for the Plaintiffs:—

Under the law as it stood before the *Settled Land Act*, 1882 (which came into operation on the 31st of December, 1882, after the issue of the writ in this action), the contemplated sale, which was admittedly for the exclusive benefit of the tenant for life, without any regard to the interests of the remaindermen, to whom it will be very detrimental, would have been a clear breach of trust: *Mortlock* v. *Buller* (1); and even if the Act of 1882 applied to the case, its provisions would not enable such a sale to be made by a tenant for life. By s. 3, a tenant for life "may sell the settled land, or any part thereof," but this general power is qualified by s. 53: "a tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties." The question, therefore, is whether an impartial trustee having a power of sale, or any prudent owner, would put up this property for sale now, when by postponing a sale a far higher price than can now be obtained may reasonably be expected. Even the tenant for life himself admits that he would not sell if tenant in fee. The estate has under it very valuable seams of coal and is surrounded by collieries, and the only witnesses who are mining experts say that by waiting until the mines are actually in operation, not only the mineral but also the surface value of the estate will be largely increased, and that it would be prejudicial to sell the surface apart from the minerals. Independently too of the minerals, which the Defendants propose to reserve, the projected railway

(1) 10 Ves. 292, 309.

V.-C. B. 1883 THOMAS v. WILLIAMS.

which, as we expect, will run through the estate in the course of a few years, will greatly increase the value of the surface.

The appointment of a new trustee by the Defendant *Llewellin* pending the action was a most improper act.

[The Vice-Chancellor referred to *In re Gadd* (1).]

Marten, Q.C., and *Mulligan*, for the Defendant, *E. T. Llewellin* :—

We rely first upon the power of sale contained in the will which is in itself abundant to justify the proposed sale, and secondly, on the cumulative powers of selling the settled property, in addition to "any power under a settlement exercisable by a tenant for life, or by trustees with his consent or on his request" given by the *Settled Land Act*, 1882, s. 56 (1).

When, as in this case, complete power is given to the trustees to sell the settled property at the request and by the direction of the tenant for life, the Court has no jurisdiction to interfere with or control the exercise of that power, unless it is being exercised *malâ fide*, of which there is no suggestion; but on the contrary the Court has always held that their discretion and authority is to be without any check or control from any superior tribunal: *Thomas* v. *Dering* (2); *Gisborne* v. *Gisborne* (3); *Tempest* v. *Lord Camoys* (4). No case whatever is made for the interference of the Court. Why is the tenant for life to be compelled to wait, and lose, for the benefit of those in remainder, all the advantage which he can now obtain from the already improved value of the property? The Court will not allow his interests to be prejudiced by postponing the sale, so as to make the reversion at some indefinite period more valuable for those in remainder: *Howe* v. *Earl of Dartmouth* (5); *Wilkinson* v. *Duncan* (6); *Wright* v. *Lambert* (7). Moreover, any future increase of price rests on the purely speculative opinion of the Plaintiffs' witnesses, which is contradicted by the evidence for the defence. And having regard to the provisions of the *Settled Land Act*, 1882, ss. 3, 17, 31, 56, the power of the tenant for life to sell is now absolutely unrestricted,

(1) 23 Ch. D 134.
(2) 1 Keen, 729, 744.
(3) 2 App. Cas. 300.
(4) 21 Ch. D. 571.
(5) 7 Ves. 137.
(6) 23 Beav. 469.
(7) 6 Ch. D. 649.

whatever his motives, however capricious, may be, and it does not appear that the Court or the trustees have any right to interfere with his exercise of this power; *Wheelwright* v. *Walker* (1); *Wolstenholme and Turner's Settled Land Act*, 1882, p. 63. The only qualification introduced by s. 53 is where some gross act destructive to the property is contemplated, and it would paralyse the operation of the Act, and introduce an extraordinary innovation, if the Court, upon the speculative opinions of experts as to the future value of the property, were to say that a sale shall not take place now, but must be postponed for an indefinite period. *In re Gadd* (2) is an express decision that even after a decree for executing the trusts of the will the donees of a power of appointing new trustees retain their power, and that if, as in this case, they nominate a proper person, that person must be appointed.

Carew, for the new trustee.

Hemming, in reply:—

This power of sale could not be properly exercised except for the purpose of reinvesting the purchase-money in land, any intention to do that having been expressly denied. Lord *Eldon* in commenting upon the exercise of a similar power in *Mortlock* v. *Buller* (3) uses these expressions: "The object of the sale must be to invest the money in the purchase of another estate, to be settled to the same uses; and they are not to be satisfied with probability upon that; but it ought to be with reference to an object, at that time supposed practicable: or, at least, this Court would expect some strong purpose of family prudence justifying the conversion, if it is likely to continue money." No doubt large powers of selling settled property are given by the *Settled Land Act*, and reinvestment in land is no longer essential, but we submit that a tenant for life has still no right to sell exclusively for his own benefit, at his own mere caprice, without any regard to the interests of those in remainder. In *Wheelwright* v. *Walker* it was not suggested that the proposed sale was

(1) 23 Ch. D. 752.

(2) 23 Ch. D. 134.

(3) 10 Ves. 292, 309.

V.-C. B. 1883 THOMAS v. WILLIAMS.

improvident, ill-timed or injudicious; and in that case great stress was laid upon the controlling influence of the trustees, and the tenant for life was actually restrained from selling until trustees had been appointed under the Act.

The appointment by the Defendant of a new trustee without the sanction of the Court, pending the action which claims the appointment of a new trustee, was a very improper act, and imposes upon the Defendant the necessity of proving by the strictest evidence that the appointment was perfectly right and proper: *Attorney-General* v. *Clack* (1).

BACON, V.C.:—

It must be confessed that this is a very singular case. I do not think there ever was one like it: at least no case that I know of has been reported. Under the will of the testator there are various limitations, amongst others one for life to the present Defendant, Mr. *Llewellin*. It is an exceedingly well drawn instrument, and provides for the trustees dealing with the estate at all times, and gives to them a power of sale if they should be requested to sell by the tenant for life. In this case the tenant for life does request them to sell; and if it stood alone only on that ground, and if there was no subsequent Act of Parliament, I could not bring myself to doubt that the tenant for life, whose right it is to have the enjoyment of what the testator has left to him in as beneficial a manner as possible, if in his honest judgment he thinks that the property ought to be sold, has a right to call upon the trustees to sell it, and the trustees have no right whatever to refuse his request. I am not considering the case of an improvident sale or of some gross breach of trust. Here, where there is no suggestion of any breach of trust being contemplated, or capable of being committed, I am asked to say, upon the evidence of what are called experts, that if the sale was postponed for a time a larger price could be obtained for the property than could be obtained at present. What right have I to rely upon the opinions of experts upon such a subject as that? They say that there is a railway about to be made, and that that will increase the value of the

(1) 1 Beav. 467.

property, that is to say, that there is a bill in Parliament —whether it will pass or not no man knows—and if it does pass no man knows whether the railway will be made in the direction proposed or not, and yet I am to speculate upon that suggestion —that the passing of the bill will increase the value of the property. Then I am also asked to speculate upon the value of the mines. That matter with regard to the mines stands in this way. The one thing given by the testator is an estate containing minerals, which would become valuable if they were worked. These are not available except to persons who have large capital, and unless there are persons with £100,000 ready to be produced, and willing to spend it upon the working of those minerals, there can be no increased value to the estate in that respect. That does not, however, diminish the value of the estate, because if the estate is put up at all, it will be put up as one entire thing which the testator has given to the present Defendant to enjoy for his life. These gentlemen who are called experts have no particular experience that I know of which should induce me to listen to what they say. They do say, however, that if the estate were put up for sale with the minerals, no doubt a purchaser would take into consideration the prospective value of the minerals, and the price to be given for the estate would be regulated by their notion of the increase of value by reason of the existence of the minerals. That is in the nature of things, and it must be so always where there is a tenant for life exercising his authority and where there are trustees exercising their powers. This estate will be sold as an estate which contains minerals. That will at once invite and attract the speculation of men who have got £100,000 and who are willing to work the mines. Have I any reason to suppose that that would diminish the value of the estate, or that if the sale of the estate was postponed for a few years that the value of it would be thereby increased? There is not a fragment of evidence, nor anything at all except the guesses and speculations of those experts, as they are called. Not relying upon their experience and knowledge in coming to an opinion which is necessarily vague and uncertain, and which they or I could form as easily and be just as much mistaken in; if it stood then upon the will I should say

V.-C. B. 1883 THOMAS v. WILLIAMS.

that there was no pretence whatever for this claim, which in terms asks that the tenant for life may be restrained from enjoying that which the testator has given to him, viz., the right to have the property sold. It does not, however, rest there only, because the Legislature has taken what may be called a very wise view of the subject. That must be taken to be so now at all events, and that must be the policy of the law—that tenants for life are not to be hampered or interfered with in the enjoyment of their estates, but, on the contrary, they are not only to be further enabled but encouraged to deal with them. Powers are given to them which they did not possess before the passing of the Act in all cases, although I think in some few cases they had the same powers before the statute as they have now. Yet the statute gives cumulative powers to those possessed before by tenants for life. It does more than that. It prohibits the trustees or anybody else interfering with or trying to fetter or contract the power which in the eye of the law a tenant for life ought to have of selling the estate of which he is only tenant for life. The clauses of the Act, which have been referred to in the argument, are perfectly distinct, and enact that where a tenant for life sells, and where there are no trustees, that he shall be considered as a trustee, and where there are trustees, their consent not being requisite, it shall not be asked for; and most ample and abundant powers are given to the tenant for life of saying that the property shall be sold. It is his right to derive any benefit he can from his tenancy for life, and if he is satisfied that he will derive a larger benefit from the sale of the estate than from its enjoyment in its present condition he has a right to have it sold. That is what the testator has given to him, and that is what is inseparable from his character of tenant for life. If the statute were out of the way the tenant for life, in my opinion, has full power to do that which he proposes to do. But when we come to look at the statute, we find that the matter is still more clear, and that the right of the tenant for life becomes more strong and his power more extensive, if a more extensive power could be required. A claim, therefore, which asks in the interests of the persons interested in remainder that the trustees may be restrained from selling at the request and by the direction

of the tenant for life, and that the tenant for life may be restrained from requesting or directing a sale of the *Hendrescythan* estate, cannot possibly succeed. On what earthly principle, and for what reason, can I possibly do that? In point of law I cannot do it, nor in point of ethics, if it were necessary, as it is not, to resort to that as a topic of complaint or demand on the part of persons who say: "If we could stop the sale of this estate, although the tenant for life will not have all the benefit which he thinks he can derive from the estate, yet we shall unquestionably be benefited, because our expert witnesses come forward and tell you that if the sale of the estate is postponed it will sell for a larger price than if sold now." Is that a reason which I can attend to? Is it anything more than saying: "Restrain the tenant for life for our benefit, and let him be restricted in order that we may enjoy more than we should if he had exercised the power which he asserts he possesses?" That is the whole case, and upon such a case as that numbers of cases dealing with trustees have been referred to—*Mortlock* v. *Buller* (1) amongst others—but they have not the smallest application to the case before me, which is a question of right between the Plaintiffs and the Defendants, viz., whether the trustee is entitled, under the will and under the statute, to proceed with the sale which he intends to make, and as to which there is no imputation, and no suggestion, that the trustee is favourable to the tenant for life. On the contrary, by his answer he says that he proposes to sell because he believes it is the right thing to do in the due discharge of his duty. The tenant for life says, I desire to sell because I shall improve my income by the sale of the estate now. They are both of them perfectly legitimate things to do, both consistent with the devise in the will, and both of them not one step beyond the rights of the several parties.

With respect to the complaint that a trustee has been appointed since this suit was instituted, I do not hesitate to confess that I had a notion, and *In re Gadd* (2) has been referred to upon this, that an appointment of another trustee ought not to take place except at the instance of the party who had obtained the decretal

(1) 10 Ves. 292.

(2) 23 Ch. D. 134.

V.-C. B. 1883 THOMAS v. WILLIAMS.

order, but the Court of Appeal said that I was totally wrong about that, and that the decree having been made, made no sort of difference in the power of the surviving trustee, who by the settlement or will was entitled upon a vacancy happening to fill it up, and therefore that he had a right to nominate the trustee, and that he possessed that right according to the regular procedure of the Court, and had always had the right. I cannot for a moment doubt that the Court of Appeal were right in the view which they took, and that the power to appoint a new trustee was vested in the person in whom by the settlement it was vested, and that he had a right to appoint the trustee. In this case there is no suggestion that he has not properly exercised that power, and therefore that contention has no influence upon me in this case. I take the claim brought forward by the Plaintiffs to be unreasonable and improper. It seeks to interfere with the legal right of the trustee and with the legal and beneficial right of the tenant for life. It asks that which the Court ought not to grant, and has no power to grant, and which, if granted, would do wrong and commit an injustice to the tenant for life. In my opinion the action must be dismissed with costs.

Solicitors: *H. A. Stephens*, agent for *Francis James, Swansea; Neal*, agent for *T. L. Jenkins, Newport.*

F. G. A. W.

Ex parte GREAT WESTERN RAILWAY COMPANY.
In re GOUGH'S TRUSTS.

V.-C. B.
1883
April 3.

Company—Purchase of Land—Payment out of Court—Costs of Incumbrancers—Lands Clauses Consolidation Act, 1845, *s.* 80 [*Revised Ed. Statutes, vol. ix. p.* 646].

After payment into Court by a company of the purchase-money of land belonging to a tenant for life and remaindermen, some of the latter mortgaged their reversionary interests in the fund.

Upon the death of the tenant for life, the owners of the fund and their incumbrancers presented a petition for payment of the fund out of Court :—

Held, that the company were not liable to pay the costs incurred by the mortgagees in proving their incumbrances.

MOTION.

A petition had been presented for the sale and payment out of Court of a sum of consols representing the purchase-money which had been paid in by the *Great Western Railway Company* under sect. 85 of the *Lands Clauses Act*, 1845, for the compulsory purchase of land. The payment in was made many years ago, not long after the passing of the statute. At that date the fund belonged to a tenant for life, and remaindermen, some of whom afterwards mortgaged their reversionary interests in the fund. The tenant for life having recently died, the petition was presented by the owners (now in possession) of the equity of redemption, and their mortgagees.

The order for payment out was made on the 17th of February, 1883, with the usual direction as to costs, but in framing this part of the order the registrar had added the words, "but such costs are not to include the costs of proving the incumbrances on the shares incumbered." As the title was somewhat intricate, the costs of proving the incumbrances had been considerable.

McSwinney, for the Petitioners, moved to vary the minutes of the order (which had not been drawn up) by the exclusion of the above words.

In *Eden* v. *Thompson* (1) the rule was laid down (in 1864), by

(1) 2 H. & M. 6, 9.

V.-C. B.
1883
Ex parte GREAT WESTERN RAILWAY CO. *In re* GOUGH'S TRUSTS.

Lord *Hatherley*, then Vice-Chancellor *Wood*, that a company under these circumstances must pay the costs of all necessary parties, occasioned not by any particular adverse claims, but by the ordinary course of dealing; and added that this principle covered the case of a mortgage. This rule was followed by the late Master of the Rolls (Sir *G. Jessel*), and the Court of Appeal in *In re Bareham* (1). All the Petitioners want is to be allowed the costs of proving these incumbrances. In principle, there can be no distinction between the costs of proving a mortgage and the costs of proving a transfer deed, or a marriage settlement, as to which no objection is ordinarily taken.

Possibly the authority of Vice-Chancellor *James*' decision in *In re Jones' Trust Estate* (2) will be relied upon. But that decision only goes to this, that if mortgagees appear by counsel, their costs of appearance will not be allowed. That merely follows the ordinary rule as laid down in *In re Gore Langton's Estates* (3).

Hemming, Q.C. and Sir *A. T. Watson*, for the Company:—

The order as settled by the Registrar is quite right. Since *In re Jones' Trust Estate* it is settled practice that if a railway company takes land, and pays the money into Court, and after payment in, the owner mortgages the fund, the company do not pay the costs of the mortgagee; and so the rule is laid down in *Seton* on Decrees (4), *Davy & Morgan* on Costs (5), and the authorities there referred to.

The utmost that a company has to pay in any case for the costs of consenting incumbrancers is 42*s.* and the costs of an affidavit of service: *In re Halstead United Charities* (6); *Ex parte Jones* (7).

McSwinney, in reply:—

The cases cited refer only to the rule which has been laid down as to appearance in Court. If the owners had petitioned, making the incumbrancers Respondents, and offering them 42*s.*

(1) 17 Ch. D. 329, 333.
(2) 18 W. R. 312.
(3) Law Rep. 10 Ch. 328.
(4) Page 1445.
(5) Page 200.
(6) Law Rep. 20 Eq. 48.
(7) 14 Ch. D. 624.

and the costs of an affidavit of service, the mortgagees would have taken no benefit, and the fund would not have been cleared.

BACON, V.-C.:—

The case is perfectly clear to my mind.

The *Lands Clauses Act*, with perfect justice, provides (sect. 80) for the payment by the company of all the costs occasioned by their taking possession of land under their compulsory powers, "except such as are occasioned by litigation between adverse claimants." In following out this rule the Taxing Master will have no difficulty. The company have nothing to do with costs as between mortgagor and mortgagee; I refer especially to cases of a mortgage made after the money has been paid into Court. The practice as laid down by the more recent authorities seem to be, that after the payment of purchase-money into Court there is an end of liability on the part of the company to costs occasioned by dealings with the fund by the owners themselves. The company must not be ordered to pay more than the Act of Parliament says they shall pay, and the costs which they are liable to pay are not to be increased by any adverse litigation, or by any subsequent matters of account as between the persons entitled.

The motion must be refused; but I make no order as to the costs of it. I am only surprised that any question should have arisen on the subject.

Solicitors: *Venn & Woodcock; R. R. Nelson.*

J. B. D.

V.-C. B. 1883 May 2, 3, 8, 9.

TEEBAY *v.* MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY.

[1882 T. 124.]

Vendor and Purchaser—Agreement for Sale—Reservation—Absolute Conveyance.

In June, 1870, an agreement was entered into by a railway company for the purchase, at a price named, of land for the purpose of carrying a road over the line at an incline, and the agreement contained a proviso that the vendor, &c., should have a right of access to other lands belonging to him by and over any of the slopes which the company might arrange on their intended works, and through, over and upon any occupation roads which they might form adjacent to the said lands. This agreement was executed by the secretary of the company, but was not under seal.

Possession was taken by the company, and a bridge was constructed over the line which was reached by a road carried over the land purchased at a steep incline. In April, 1871, the land, with all ways, rights of pre-emption, and other rights, members, easements and appurtenances, was, in consideration of the price named in the agreement, which was stated to include the value of the mines and also all right of pre-emption and compensation for damage sustained by vendor in the execution of the works, conveyed to the company, without reserving any right of access to the vendor or in any way referring to the proviso contained in the agreement of June, 1870:—

Held, in an action by the vendor to restrain the company from obstructing, by fences and retaining walls rendered necessary by a widening of the road, the right of access stipulated for by the proviso in the preliminary agreement, but not claiming a rectification of the subsequent conveyance, that as the vendor by the terms of the conveyance had absolutely conveyed to the company every interest which he possessed in the land, any right of access previously stipulated for was thereby absolutely extinguished.

In 1868, the Defendants, the *Cheshire* Lines Committee commenced, under the powers of their Acts, 1865–1867, the construction of a railway from *Manchester* to *Childwall*, in the county of *Lancaster*. Near the *Farnworth* station, it being necessary to cross a road leading from *Farnworth* to *Appleton* and *Widnes*, it was determined by agreements with the *Widnes* Local Board to carry the road over the railway by a bridge with an embanked and raised approach on each side. In order to construct the embankment for the northern approach certain copyhold lands, of which *Richard Teebay*, father of the Plaintiff, *R. G. Teebay*,

was the surviving trustee under the will of *John Smith*, deceased, were required to be taken, and on the 16th of June, 1870, an agreement, signed by the secretary of the committee, but not under the seal of the company, was entered into by which *Richard Teebay* agreed to sell to the *Cheshire* Lines Committee certain pieces of land for £1430. This agreement contained a proviso that the vendor (*Teebay*), his heirs or assigns and his or their undertenants, should have a right of access to other lands belonging to the vendor by and over any of the slopes which the promoters might arrange on their intended works, and through, over and upon any occupation road or roads which they might form adjacent to the said lands.

Immediately upon the execution of this agreement the promoters entered into possession and constructed a bridge over the railway, with an approach on an embankment, the sides of which had an incline of about 1 in 2. The lands comprised in the agreement of June, 1870, were in April, 1871, conveyed to the promoters by deed poll of the 25th of April, 1871, and a contemporaneous indenture contained covenants for title.

By the deed poll, *Richard Teebay*, in exercise of the power given by the will of *John Smith*, deceased, and with the consent of his widow *Ellen Smith*, in consideration of £1430 conveyed to the committee all those several pieces of land, which were then staked, set out or required, and parts whereof were used for the purpose of the railway and works authorized by the *Manchester*, &c. (*Extension, Liverpool*) Act, 1865, "together with all mines of coal, &c., and all ways, rights of pre-emption and other rights, members, easements and appurtenances thereto belonging, and all such estate, right, title and interest in and to the same as he was or should become seised or possessed of, or was by the said Act or otherwise empowered to convey, to hold the premises to the committee, their successors and assigns for ever, according to the true intent and meaning of the said Acts."

By the indenture of covenant which was made between *Richard Teebay* of the 1st part (the trustee), *Ellen Smith*, widow of *John Smith*, of the 2nd part (the person beneficially entitled), and the promoters of the 3rd part, after reciting that the promoters under the powers of their Acts, had contracted with *Teebay*, with the

V.-C. B. 1883

TEEBAY v. MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY CO.

consent of *Ellen Smith*, for the absolute purchase of the particular hereditaments for £1430 "which it was agreed shall include the value of the mines, &c., and also all right of pre-emption of and in the same hereditaments and compensation for the damage that had been or might be sustained by the said *R. Teebay*, or occasioned to his remaining lands by reason of the execution of the works for which the said hereditaments or any part thereof are required or by otherwise injuriously affecting such other lands by the existence of the powers of the said Acts or any of them," and reciting the conveyance by deed of even date, *Richard Teebay* entered into the usual covenants for title with the promoters.

According to the case made by the statement of claim, the promoters, previously to the agreement of June, 1870, represented to *Teebay*, and he and his advisers were thereby induced to believe, that there would be no fence between the eastern slope of the northern approach and his lands except a wooden post and rail fence, such as was afterwards constructed at the foot of the eastern slope, and that there would be nothing to interfere with the free access for the owners and occupiers of the Plaintiffs' lands from over the eastern slope from such lands. They had also previously furnished *Teebay* with a section shewing how it was proposed to carry the road over the line, and the incline at which the northern approach was to be constructed and maintained, and but for their representations, and the belief that such representations would be carried out, *Teebay* and his advisers would not have accepted £1430 as the full purchase and compensation money for the land comprised in the agreement—his valuer in estimating the amount having taken into account the retention by the vendor of the right of access over any slope which might be formed by the promoters—and the subsequent conveyance would not have been executed.

These allegations were denied by the Defendants, the *Cheshire* Lines Committee.

In 1879, upon the widening of the road over the railway, the Defendants, the *Widnes* Local Board, under an agreement with the *Cheshire* Lines Committee, removed the greater part of the post and rail fence, and had constructed two pieces of wall at the foot of the eastern slope as supports for the slope, and also

erected a barrier seven feet high, composed of old railway sleepers; the effect of these alterations being, in contravention, as the Plaintiffs alleged, of the agreement of June 1870, entirely to destroy the access of the Plaintiffs from their lands over any part of the eastern slope to the road on the top of the northern approach, to interfere with the surface drainage of the Plaintiffs' lands, and greatly to diminish the value of the land as building land, or for other purposes.

This action was commenced in January, 1882, to restrain the Defendants, the *Cheshire* Lines Committee, and the *Widnes* Local Board from proceeding with the construction of the walls, and from permitting to remain any part already constructed, and also from permitting the barrier to remain, and from otherwise obstructing or interfering with the Plaintiffs' access from their lands by and over the eastern slope of the northern approach to the road on the top of such approach.

Hemming, Q.C., and *Badcock*, for the Plaintiffs:—

The Defendants, the railway company, are not entitled to deprive us without compensation of the right of access which they undertook, both verbally and by the proviso contained in the agreement of June, 1870, to give us over the land conveyed to them; and notwithstanding the omission in the conveyance of this proviso they are bound in good faith, and by the rules of this Court, to perform the stipulations they have entered into, and to make good the representations on the faith of which the sum of £1430 was accepted as the purchase-money: *Piggott* v. *Stratton* (1). The agreement of June, 1870, having been acted on by the company, is binding upon them though not under their common seal: *Wilson* v. *West Hartlepool Railway Company* (2); *Melbourne Banking Corporation* v. *Brougham* (3); *Crook* v. *Seaford Corporation* (4). The subsequent execution of a conveyance under seal which omits this proviso does not conclude the Plaintiffs from obtaining the benefit of the antecedent contract: *Bos* v. *Helsham* (5). Having regard to the form of the conveyance, viz.,

(1) 1 D. F. & J. 33.
(2) 2 D. J. & S. 475.
(3) 4 App. Cas. 156.
(4) Law Rep. 6 Ch. 551.
(5) Law Rep. 2 Ex. 72.

V.-C. B. 1883 TEEBAY v. MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY CO.

by deed poll, executed by the vendor only, this easement claimed by the Plaintiffs could not have been reserved: *Gale* on Easements (1). General words of release, however sweeping, are of no avail if given by persons not conversant of their rights, and if extending to matters not contemplated by the releasors; and will not extend to release any other claims than those specified in the recitals: *Davidson's* Conveyancing (2).

Marten, Q.C., and *W. Phipson Beale*, for the Defendants, the *Cheshire* Lines Committee:—

The agreement of June, 1870, not being under seal is not binding upon the company: *Companies Clauses Act*, s. 97. But assuming that the agreement is not invalid from the absence of the seal of the company, we say that it was entirely superseded by the subsequent conveyance, which alone contains the real contract between the parties, and in which Mrs. *Smith*, the beneficiary, is for the first time introduced as a party to the sale carried out under the power of sale in the will which gives no right to reserve any such easement. That conveyance is absolute, reserves no rights or easements to the vendors, was intended to put an end to all claims of this kind, and the purchase-money is expressed to be in full compensation for all land, mines, &c., and for all damage that might be sustained; and being inconsistent with the antecedent agreement, and directly negativing any such right as is now claimed by the Plaintiffs, no effect can be given to that agreement as against the conveyance. Part performance will not help the Plaintiffs, as when an agreement to which the *Statute of Frauds* would be a defence is set up, and that agreement is followed by a conveyance, any acts of part performance will be referred to the subsequent conveyance, which shews the intention of the parties, and not to the earlier agreement.

In *Wilson* v. *West Hartlepool Railway Company* (3) there was no subsequent conveyance as in this case. In *Melbourne Banking Corporation* v. *Brougham* (4) the bank as mortgagees had accepted and obtained the benefit of a release of the equity of redemption in pursuance of an agreement not under seal, which had been

(1) Page 85.
(2) Vol. v. part ii. p. 147.
(3) 2 D. J. & S. 475.
(4) 4 App. Cas 156.

acted on by both parties and of which they had both had the benefit. We do not dispute the proposition of law cited from *Davidson's* Conveyancing (1), but it does not apply, as no case whatever has been shewn of ignorance of rights; the release having been given with perfect knowledge and understanding on the part of those who made an absolute conveyance to the company. *Bos* v. *Helsham* (2) does not apply, as in that case the mistake in respect of which compensation was given was latent when the conveyance was executed, and the execution of the conveyance did not preclude the Court from giving effect to a condition that compensation should be given whenever any mistake, &c., should be discovered. As to the slopes and the sleeper fence we deny, and there is no evidence to shew, that the representation alleged by the Plaintiffs to have been made on behalf of the company was ever made, which distinguishes this case from *Piggott* v. *Stratton* (3). The company are under a statutory obligation to erect and maintain good and sufficient fences: 5 & 6 Vict. c. 55, s. 10; *Railway Clauses Act*, 1845, ss. 50, 68; and as the slopes were not superfluous lands within the *Lands Clauses Act*, 1845, s. 127, but land actually required for the purposes of the railway, the company had no power to grant any easement over the slopes: *Mulliner* v. *Midland Railway Company* (4); *In re Metropolitan District Railway Company and Cosh* (5).

With respect to the supporting walls that have been built, the road when completed was taken over by the *Widnes* Local Board under their statutory powers. Any alterations in the level or otherwise have been made by the local board, and there was and could be no bargain by the company with the Plaintiffs that the road should not be at any time altered, or that the company should interfere with the powers and statutory rights of the local board in whom the road when completed, and so long as it continues to be used as a road, is vested: *Rolls* v. *Vestry of St. George the Martyr* (6). Even if it should be considered that the company were under any obligation to the Plaintiffs in respect of the slopes, the case is not one for specific performance but for an inquiry as

(1) Vol. v. part ii. p. 147.
(2) Law Rep. 2 Ex. 72.
(3) 1 D. F. & J. 33.
(4) 11 Ch. D. 611.
(5) 13 Ch. D. 607.
(6) 14 Ch. D. 785.

V.-C. B. 1883

TEEBAY v. MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY CO.

to damages: *Wilson* v. *Northampton and Banbury Junction Railway Company* (1).

Horton Smith, Q.C., and *Medd*, for the *Widnes* Local Board:—

The agreement for purchase having developed into a conveyance, no previous contract or previous arrangement between the parties can be looked to in order to put any construction upon the conveyance, which is absolute, and alone must regulate the rights of the parties: *Wheeldon* v. *Burrows* (2); and where, as in this case, the conveyance contains no proviso or restriction, the purchaser will hold the land unfettered by the original proviso, and unfettered by an implied reservation: *White* v. *Bass* (3); and there is no difference from the fact that the antecedent agreement is in writing and not merely verbal. No cause of action is shewn against the local board, and in any case no action can be brought against a local board except within six months after the accruing of the cause of action: *Public Health Act*, 1875, s. 264. The local board have not exceeded their statutory powers in doing what was necessary for altering the level and widening the road: *Roderick* v. *Aston Local Board* (4); *Burgess* v. *Northwich Local Board* (5); *Public Health Act*, 1875, ss. 144, 147, 149. If the Plaintiffs have sustained any damage, or have had the easement which they claim injuriously affected, by the exercise by the local board of their statutory powers, the remedy given is by claim for compensation under the *Public Health Act*, 1875, s. 308: *Nutter* v. *Accrington Local Board* (6); and there is no right to restrain the local board by injunction: *Duke of Bedford* v. *Dawson* (7); *Clark* v. *London School Board* (8). We claim damages under the Plaintiffs' undertaking for the injury which we have sustained by the interlocutory injunction.

Hemming, in reply, cited *North Staffordshire Railway Company* v. *Dale* (9), and referred to sects. 147, 149 of the *Public Health Act*, 1875.

(1) Law Rep. 9 Ch. 279.
(2) 12 Ch. D. 31.
(3) 7 H. & N. 722.
(4) 5 Ch. D. 328.
(5) 6 Q. B. D. 264.
(6) 4 Q. B. D. 375.
(7) Law Rep. 20 Eq. 353.
(8) Ibid. 9 Ch. 120.
(9) 8 E. & B. 836.

BACON, V.C., after stating the object of the action and the case set up on behalf of the Plaintiffs, that the proviso contained in the agreement of June, 1870, remained in full force, notwithstanding all that had taken place between the parties, said:—

Now, it is convenient to keep in mind what the real subject of this contention is. The railway company intended to carry their railway across this district, that is to say the *Widnes* district, and they intended, first of all, to carry it over the existing roads; they afterwards changed their plans and carried it through a cutting through the existing roads, one of which is called the *Birchfield Road*. In order to do that effectually, they did, as the law requires them, set about making the *Birchfield Road*, and in order to support that road and for no other purpose, they bought as much of the Plaintiffs' land as was necessary in order to support the road which they were bound to make for themselves. That was the state of things when this agreement of June, 1870, was entered into before the slopes were made. The company entered into possession of the land under that agreement, and they proceeded to effect these works, and in the following year, on the 25th of April, 1871, this conveyance was executed, by which the trustee, Mr. *Teebay*, conveys the several pieces of land, and so on—"together with all mines of coal, slate, and other minerals within and under the same, and all ways or rights of pre-emption and other rights, members, easements, and appurtenances thereto belonging, and all such estate, right, title, and interest in, and to the same as he was or should become seised or possessed of, or was by the said Act or otherwise empowered to convey."

That document refers to a deed of even date which was executed by *Teebay*, as trustee under the will of *John Smith*, with the consent of *Ellen Smith*, who was the person interested. That deed relates only to the title. What then took place between June, 1870, and that deed of April, 1871, which in its terms passes all rights as well as all estate that the grantor could possibly be said to possess? Reference has been made to several cases, upon the strength of which it was alleged that the terms of the agreement are still in all their force and vitality, and that they are as much binding upon the Defendants the railway

V.-C. B. 1883 TEEBAY v. MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY CO.

company, as if no contract whatever had been made. I do not think that the cases referred to bear out any such proposition. In *Melbourne Banking Corporation* v. *Brougham* (1) there had been a bargaining for the sale of an equity of redemption of an insolvent's estate. The mortgagee in that case bought the equity of redemption, and he claimed in the insolvency any balance that might be due to him. But it was wholly inconsistent with the nature and terms of the bargain for the equity of redemption that he should assert any such right. In that case it was therefore held, having regard to the facts and the circumstances of the case and the rights of the parties, that the mortgagee who had kept the pledge for the whole of his debt, and who had paid another sum of money to buy out the equity of redemption, could not after that have a right to prove for his debt in the insolvency. I cannot see that that decision has any sort of bearing upon the case before me. In this case, if there had been a bill filed alleging that the deed of 1871 had been executed by mistake or inadvertence or without properly attending to the rights of the parties then existing, I might have listened to such a case. In such a case it is not necessary for me to say there might be a question as to the specific performance of the agreement or as to the rectification of the deed of conveyance, but no such case is presented to me. Mr. *Teebay*, the man who contracted for the sale in June, 1870, was a practitioner in the law. He must be taken to have known very well what he was doing; and when he and his *cestui que trust* afterwards joined in perfecting the conveyance which had been made, he, in the exercise of his legal right, conveyed all rights, ways, easements, estate, and everything else. At law nobody can dispute that that is an absolute extinguishment of any rights which could be asserted under the agreement. Are there any equitable circumstances which would induce me to hold otherwise? Certainly not. Mr. *Teebay* does not say that he was mistaken; he does not say that anything took place in the way of correspondence, or communication, or anything else, but that there is a vague reservation, contained in the agreement, of the rights of access over the slope, and that

(1) 4 App. Cas. 156.

is all that the present claim rests upon. For the claim to the right of occupation roads there is now no foundation. If any occupation roads should be made, then no doubt under the agreement, or without the agreement probably, the Plaintiffs would have a right to avail themselves of those occupation roads. But the simple case presented upon the opening of the case was that the stipulation, giving the Plaintiffs rights of access over the slope, still exists. What does a right of access over the slope mean? Do they say they have ever asked for liberty to traverse these slopes, or by what means they could traverse them, or to what end they could make any use of them? It might be that in the construction of the railway or other circumstances which might have happened, there might be some meaning in these words "right of access." Right of access over a steep bank or slope, the inclination of which is 1 in 2, is a matter which I cannot feel there is any foundation or pretence for discussing. If the case stood only on that, and it must mainly depend on that, I should say that the Plaintiffs have failed to establish any case whatever against the railway company; but so many other things have been discussed that it is worth while to look a little closer into the case and see what has been the conduct of the parties from 1870 until 1882, when the quarrel broke out. I should have said also, that the statement of claim complains that the road has been raised, and that by the raising of the road the Plaintiffs' property has been damaged.

The slopes, for the right to make which a considerable sum was paid to *Teebay's* predecessor who was in possession at that date, were made and there is no claim of access. There is no possibility of using any access, and no suggestion that the right, if it existed, was of any use whatever to these Plaintiffs. For years this matter goes on, and then the railway company having discharged what was plainly their duty, and as clearly their interest, in making this road to the point where it went into the dip, agreed with the Local Board of *Widnes*, that the local board should take upon themselves the further formation and the future care of these roads. The agreement is very explicit on the subject, and is not, as was suggested in reply, an agreement in

V.-C. B. 1883

TEEBAY v. MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY CO.

prospective, or an agreement which is to have no effect until the works are done and the money is paid.

[His Lordship, after discussing the facts and evidence upon this part of the case, which is not material for the present report, held that with respect to the widening and raising the road and the erection of the retaining walls, the Plaintiffs' claim against the *Widnes* Local Board, who had been acting in the discharge of their public duty, and had done what was indispensable for the proper exercise of their powers, failed entirely, proceeded:—]

In my opinion, these proceedings cannot be justified upon the authority referred to, because I find that in 1871, the conveyance was executed by a man who was cognizant of his rights, specifying in wide general terms all the rights he had or was supposed to possess, and conveying by law those pieces of land unfettered by any restriction to the Defendants, the railway company. But supposing there was anything wrong in that, which I do not, if there were no *Widnes* Board, the Defendants would, in my opinion, be perfectly entitled to build a retaining wall, so as to prevent the slope slipping and becoming damaged; because the slope is the support of the road which the Defendants are bound to make. The *Widnes* Local Board have positively done nothing of which the Plaintiffs could complain, nothing which the Plaintiffs did not know. What has been done has been done with the perfect knowledge of the Plaintiffs, and it has been done long enough to prevent their getting any remedy in the shape of an injunction. If they have any other remedy they can assert it, but in this Court, upon this record and upon this evidence, they cannot set up the stipulation in the agreement giving them a right of access, which they have never attempted to exercise, and which there is no possibility of their exercising unless the railway company should choose to open a door for them to clamber up the slope if they should ever take it into their heads to do that. That is not within the scope of this record. In my opinion, the Plaintiffs' case entirely fails, and their claim must be dismissed and dismissed with costs against both the Defendants.

An inquiry what damage had been sustained by the Defendants,

the *Widnes* Local Board, by reason of the injunction obtained by the Plaintiffs on the ordinary undertaking, was granted.

Solicitors: *Crowder, Anstie, & Vizard*, agents for *Lynch & Teebay, Liverpool; Cunliffe, Beaumont, & Davenport*, agents for *Lingards, Manchester; Maples, Teesdale, & Co.*, agents for *H. S. Oppenheim, St. Helens.*

F. G. A. W.

In re JONES.

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 58, *cl.* 1 (IX.)—*Limited Owner—Power of Sale—Tenant for Life.*

Subject to a term for raising certain sums, freehold estates were devised to the use of trustees during the life of *A.* without impeachment of waste, with remainders to the use of *A.*'s children in tail. The trustees were to enter into possession, and during the life of *A.* manage the property and pay all expenses and outgoings, and keep down the interest on charges, and pay the balance or ultimate residue of the rents and profits to *A.* during his life. After paying all outgoings, only a very small annual surplus remained payable to *A.*:—

Held, that *A.* was under the will a person "entitled to the income of land under a trust or direction for payment thereof to him during his life, subject to expenses of management," within the *Settled Land Act*, 1882, s. 58, cl. 1 (IX.), and therefore possessed the powers of selling given by the Act to tenants for life.

ADJOURNED SUMMONS raising the question whether the applicant, Colonel *Grey*, could exercise the powers of sale given to a tenant for life by the *Settled Land Act*, 1882.

Calvert R. Jones, who died on the 7th of November, 1877, by his will, dated the 24th of October, 1877, devised his freehold estates to the use of his wife and his son-in-law Colonel *Alfred Grey* (the applicant), for a term of 2000 years, and subject thereto and to the trusts thereof, which were for raising two sums of £30,000 and £15,000, to the use of *H. De la Beche Dillwyn*, *Thomas Falconer*, and *H. L. Pemberton*, their heirs and assigns, during the life of Colonel *Grey*, without impeachment of waste, and from and after the death of Colonel *Grey* to the use of each of the sons of testator's deceased daughter by Colonel *Grey*, and the assigns of such son, during his life, with remainders over in tail. The

V.-C. B. 1883 *In re* JONES.

testator then declared that his freehold estates were devised to the use of *Dillwyn, Falconer*, and *Pemberton*, upon trust that they should enter into possession or receipt of the rents and profits of the devised premises, and, during the life of Colonel *Grey*, continue in such possession and manage the premises as therein mentioned, cut timber and underwood from time to time in the usual course for sale or repairs, or otherwise, and erect, pull down, and repair houses and other buildings, drain or otherwise improve the premises, and lay out the same or any part thereof for building purposes, accept surrenders of leases and tenancies, and generally deal with the premises as if they were the absolute beneficial owners, without being answerable for loss or damage; and during the life of Colonel *Grey*, out of the rents and profits (including the produce of the sale of timber and underwood) pay and discharge the expenses of management and all outgoings which they should think fit to pay, and keep down the interest of any principal sums which for the time being might be charged, by way of mortgage or otherwise, upon the premises or any part thereof; and during the life of Colonel *Grey* to pay out of the residue of such rents and profits an annuity of £400 per annum to the son of testator's deceased daughter, for the time being entitled to the first estate for life or in tail male or tail next after the death of Colonel *Grey*, when such son should attain twenty-one, and to pay the balance or ultimate residue of such rents and profits to Colonel *Grey* and his assigns during his life. Full powers were given by the will to the trustees, with the consent of Colonel *Grey* during his lifetime and also after his death during minorities, and also to every person under the will made legal tenant for life, to grant mining and building leases, and similar powers of sale or exchange.

In June, 1880, Vice-Chancellor *Hall* declared that the mortgage debts and interest were a charge on the real estate in exoneration of the personal estate.

The charges upon the devised estates were very heavy, the balance of income over outgoings being £60 only, and up to the present time there had been no surplus rents for Colonel *Grey*, there being arrears of interest due to the testator's widow, and as yet no payment had been made to Colonel *Grey's* son, now

twenty-two years old, in respect of his annuity of £400 per annum.

In July, 1881, a portion of the estate was sold by the trustees for £55,000, and the proceeds applied towards reducing the amounts due on mortgage.

Colonel *Grey* being desirous of selling a further portion of the property, while the surviving trustee objected in the interests of the persons ultimately to become entitled, this summons was taken out under the *Settled Land Act*, 1882, on behalf of Colonel *Grey*, for the opinion and direction of the Court on the questions whether under the will he (*Alfred Grey*) was a person entitled to the income of the land thereby settled under a trust or direction for payment thereof to him during his own life, subject to expenses of management within the meaning of the *Settled Land Act*, 1882, s. 58, cl. 1 (IX.); and whether, as such person or otherwise, he had the powers of a tenant for life under the Act.

Marten, Q.C., and *Northmore Lawrence*, in support of the summons:—

Colonel *Grey*, as the person beneficially entitled during his life to the rents of the settled property, subject to the expenses of management, or to a trust for payment of debts, is a limited owner within the *Settled Land Act*, 1882, s. 58, cl. 1 (VI.), (IX.), and as such has the powers of a tenant for life under the Act, including that of selling the settled property (s. 3). Actual receipt of income is not necessary, as by s. 2 (7) he has the powers of a tenant for life, notwithstanding that "under the settlement or otherwise the settled land is incumbered or charged in any manner or to any extent."

The intention of the Legislature was clearly to provide for such a case, as if the estate remains unsold Colonel *Grey*, the tenant for life, gets no benefit whatever from it.

They referred to *Wolstenholme & Turner's* Settled Land Act, 1882 (1).

Oliver A. Saunders, for the surviving trustee, *contrà*:—

The *onus* is on the applicant to shew that he is entitled to exercise the extraordinary powers conferred by the *Settled Land*

(1) Pages 66, 68.

V.-C. B. 1883 *In re* JONES.

Act upon tenants for life. These powers are conferred upon two classes, (1) actual tenants for life, (2) *quasi* tenants for life, *i.e.*, persons who are put by the Act in the position of tenants for life.

[BACON, V.C. :—There is no distinction under the Act between the two classes.]

Is Colonel *Grey* "a person entitled to the income of land?" He receives nothing, and it is admitted that for many years there can be no income from this property.

[BACON, V.C., called attention to the words of sect. 2 (7), "notwithstanding that the settled land is incumbered or charged in any manner or to any extent."]

The Act imposes two tests—right to possession or right to income—and as Colonel *Grey* satisfies neither condition, not being in actual possession, nor in actual receipt of income, he is not a person entitled to exercise the powers of a tenant for life under the Act.

BACON, V.C. :—

It is necessary to proceed under the Act with caution, but the Act is plain in its terms, and as to this case is conclusive. It gives to tenants for life powers which they did not possess before, one being a power to sell. It has been attempted in argument to draw a distinction between pure tenants for life and *quasi* tenants for life, but no such distinction exists. A tenant for life is a person so defined by the Act. It was also argued that actual receipt of income was necessary to constitute a person a tenant for life. It is sufficient, in order to exercise the powers of a tenant for life, to be entitled to income, whether in actual receipt of income or not. Those are the very terms of the statute. Colonel *Grey*, under the will, is entitled to the income of the settled land during his life, subject to the expenses of management, and therefore, in accordance with sect. 58, cl. 1 (IX.), he is entitled to exercise the powers of a tenant for life.

Solicitors: *Hunters, Gwatkin, & Haynes*; *Tamplin, Tayler, & Joseph*, agents for *Stricks & Bellingham, Swansea.*

F. G. A. W.

FINNIS AND YOUNG to FORBES AND POCHIN. (No. 1.)

V.-C. B.
1883
May 30.

[1882 F. 1372.]

Vendor and Purchaser—16 & 17 *Vict. c.* 137 [*Revised Ed. Statutes, vol. xi. p.* 982]—18 & 19 *Vict. c.* 124, *s.* 29 [*Revised Ed. Statutes, vol. xii. p.* 793]—5 & 6 *Will.* 4, *c.* 76 [*Revised Ed. Statutes, vol. vii. p.* 911]—*City Ward*—*Sale*—*Consent of Charity Commissioners.*

Land purchased by one of the wards of the city of *London* out of the common moneys belonging to the ward, for the purpose, as declared by a deed of trust then executed, of providing a watch-house and suitable rooms for transacting the business and keeping the records of the ward, and subsequently let out on lease, may be conveyed to a railway company (requiring to take the premises under their compulsory powers) without the consent of either the Charity Commissioners under the *Charitable Trusts Acts*, 1853 and 1855, or the Lords of the Treasury under the *Municipal Corporations Act*, 1835; nor is it necessary that the sale should be completed under the provisions of the *Lands Clauses Act.*

ADJOURNED SUMMONS on behalf of *Thomas Quested Finnis* and *John Young*, the alderman and deputy of *Tower Ward*, for the purpose of obtaining a declaration that a good title had been shewn to, and that the applicants were entitled to convey, No. 92, *Great Tower Street*, for an estate of fee simple, and that the concurrence or consent of the Charity Commissioners was not necessary, and also that, although no such concurrence or consent had been obtained, it was not necessary that the sale should be completed under the provisions of the *Lands Clauses Acts.*

The property in question had been purchased in 1822 out of the common moneys belonging to *Tower Ward*, for the purpose of erecting thereon a more convenient watch-house, and for providing suitable premises for the courts and meetings of the alderman, deputy and common councilmen, and commissioners of the land tax, and protecting the books and documents of the ward.

This purchase was effected by deeds of the 29th and 30th of March, 1822, by which, in consideration of £1050, the property was conveyed to trustees upon trust to permit and suffer the alderman, deputy, and common councilmen (present and future) for the said ward for the time being, out of the common moneys

V.-C. B. 1883 FINNIS AND YOUNG TO FORBES AND POCHIN. (No. 1.)

belonging to the said ward which then were or should or might from time to time, or at any time or times thereafter, be remaining in the hands of the treasurer for the time being of and for the said ward, to pull down, alter, convert, and remove the messuage or tenement then on the said land, and all the appurtenances, and in the place thereof out of the funds aforesaid to erect a more commodious building, with suitable watch-house and all necessary and convenient offices for the purposes thereinbefore mentioned.

The house comprised in this conveyance was soon afterwards altered and converted into a building adapted to the above-mentioned purposes, and was thenceforth appropriated and used accordingly.

Upon the conveyance of the property to new trustees by deed of the 2nd of December, 1844, the trusts declared were to indemnify the old trustees against all costs, charges, damages, and expenses by reason of their having executed such conveyance (of the property to the new trustees) and, subject thereto, upon trust to stand seised of the premises upon the trusts of the deed of March, 1822, so far as they were then subsisting and capable of being carried into effect; and subject thereto, and as to so much and such parts of the premises as might not be required for such subsisting intents and purposes, upon trust to stand seised of the premises, and to permit the same from time to time to be used and appropriated for such further or other intents and purposes as the alderman, &c., for the time being of the *Tower Ward* should direct or appoint, but so that such new or other trust purposes should (so far as the nature of the case would permit) conform to or be consistent with the spirit and design of the trusts and purposes to which the said hereditaments were originally devoted and applied by the deed of March, 1822, and for no other trust, &c.

In 1846 a lease was granted of the property for a term of forty-two years at a rent of £70.

On the 28th of March, 1882, an agreement was signed between *Thomas Q. Finnis*, alderman, and *John Young*, deputy of the *Tower Ward*, of the one part, and *J. S. Forbes* and *H. D. Pochin*, on behalf of the Metropolitan and District Railways Joint Committee, of the other part, for the sale of No. 92, *Great Tower Street*, for £4750.

V.-C. B.
1883
FINNIS AND YOUNG TO FORBES AND POCHIN. (No. 1.)

Objections having been taken by the purchasers that the vendors were trustees either for municipal or charitable purposes without power of sale, and that in one case they would require the consent of the Lords of the Treasury, and in the other of the Charity Commissioners, to any sale by them unless made under the *Lands Clauses Act*, 1845, a summons had been taken out by the vendors under the *Vendor and Purchaser Act*, 1874, for the purpose of obtaining a declaration that a good title had been shewn without such consents, and was now adjourned into Court.

E. Cooper Willis, Q.C. (*F. Cooper Willis*, with him), for the vendors:—

It is suggested that this property is held upon a charitable trust, of which the alderman, deputy, and common council of the ward are the trustees, and therefore that they cannot sell without the approval of the Charity Commissioners. We submit that property purchased by a City ward with its own funds for purposes of the ward is not within the definition of a "charity" given in the *Charitable Trusts Act*, 1853 (16 & 17 Vict. c. 137), s. 66, the trustees of which are, by the *Charitable Trusts Amendment Act*, 1855 (18 & 19 Vict. c. 124), s. 29, prohibited from selling "otherwise than with the express authority of Parliament, &c., or with the approval of the board." It has never yet been held that one of the City wards cannot deal with its own funds and its own property unless they obtain the sanction of the Charity Commissioners. Then it is suggested that if this be not so, the property is subject to the restrictions of the *Municipal Corporations Act* (5 & 6 Will. 4, c. 76), and, by sect. 9, cannot be sold except with the approval of the Lords of the Treasury. But the provisions of that Act are limited (sect. 25) to the boroughs named in the schedule; there is not one word extending them to any part of the city of *London*, and it has never been held to be so. We submit, therefore, that we can make a good title to this property.

Farwell, for the purchasers:—

Upon the authorities and upon these deeds the vendors clearly hold this property for charitable purposes. Gifts for any legal

V.-C. B. 1883 FINNIS AND YOUNG TO FORBES AND POCHIN. (No. 1.)

public or general purpose, though beneficial to the rich as well as to the poor, are charitable gifts within the statute of *Elizabeth*, and it is not material that the particular public or general purpose is not expressed in the statute, all other legal public or general purposes being within the scope of that statute: thus a gift to build a sessions house or house of correction, and other instances *ejusdem generis*, and impossible to be distinguished from the present case, have all been held to be charitable gifts: *Attorney-General* v. *Heelis* (1); *Tudor's* Charitable Trusts (2).

[BACON, V.C.:—Where is the donor? When does it begin to be a gift? With their own money the ward buy land and build upon it this house, which they use for their own purposes. How does it become a charity?]

They have executed a deed declaring trusts of the property which are charitable trusts. If with my own money I buy land and convey it upon certain trusts to myself to hold upon those trusts, I thereby constitute myself a trustee for charitable purposes, and it makes no difference that I am myself the donor. In this case, having taken a conveyance to themselves of land upon trusts which are charitable, they thereby constitute themselves trustees for charitable purposes, and cannot get rid of it without the consent of the Charity Commissioners. Are the vendors entitled to the proceeds, to be disposed of as they think fit? We submit that this property is held by the vendors either for charitable or for municipal purposes. In the one case the consent of the Charity Commissioners must be obtained, in the other that of the Lords of the Treasury. If the vendors do not obtain either of these consents the purchasers will be bound to pay the money into Court under the *Lands Clauses Act*, and the Court will have control over the application of the money.

BACON, V.C.:—

There is no such question as is sought to be raised on the part of the purchasers. This is said to be a charitable trust created by people by a conveyance which contains a recital that the then purchasers have, out of the common moneys belonging to the

(1) 2 S. & S. 67. (2) 2nd Ed. p. 13.

ward, bought the land which they dedicate to the purpose afterwards mentioned in the conveyance. There is no beginning of a charity; there is no thought of a charity. With their own money, at that time in their own box, they buy land, and it becomes theirs, and they declare in this instrument a trust of the purpose for which it shall be applied. There is no charitable trust in that. As to the *Municipal Corporations Act* it is clear that this is not a body under that Act. In my opinion there is a very good title shewn. The consent of the Charity Commissioners or of the Lords of the Treasury need not be obtained, nor is it necessary that the sale should be completed under the provisions of the *Lands Clauses Act.*

Solicitors: *J. E. Shearman & Son; Burchells.*

F. G. A. W.

FINNIS AND YOUNG TO FORBES AND POCHIN. (No. 2.)

[1882 F. 1372.]

Vendor and Purchaser—Charity wholly maintained by Voluntary Contributions —16 & 17 *Vict. c.* 137, *s.* 62 [*Revised Ed. Statutes, vol. xi. p.* 999]—18 & 19 *Vict. c.* 124, *ss.* 29, 48 [*Revised Ed. Statutes, vol. xii. pp.* 793, 797]—*Consent of Charity Commissioners.*

Land purchased by one of the City wards and used for the purposes of the ward charity school, which had no endowment and was wholly maintained by voluntary contributions, is within the exemptions of the *Charitable Trusts Act*, 1853, s. 62, and sect. 48 of the Act of 1855, and may be sold without the concurrence or consent of the Charity Commissioners.

THIS was a second summons between the same parties, raising the question whether Alderman *Finnis* and Deputy *Young* had shewn a good title to, and were entitled to convey, No. 91, *Great Tower Street* without obtaining the concurrence or consent of the Charity Commissioners.

Prior to 1808 the *Tower Ward Charity School*, which (as stated in the affidavit by the vendors' solicitor) was a charity school supported by voluntary subscriptions—the bulk of such subscriptions, as they were from time to time collected, being required for the purposes of the school, while the residue was invested in the name of the treasurer (who acted gratuitously), or appropriated

V. C. B. 1883

FINNIS AND YOUNG TO FORBES AND POCHIN. (No. 2.)

as the directors thought fit for the benefit of the school—was carried on in premises held by the directors of the school under a lease from the vicar and churchwardens of *All Hallows, Barking*. The school premises being required for the purpose of improving the Excise Office the directors in 1808 sold their interest therein for £1200 to the Board of Excise, and by deed (enrolled) of the 29th of June, 1808, in consideration of £2000 recited to have been paid out of funds belonging to the charity, the premises No. 91, *Great Tower Street* were conveyed to the directors of the school upon trust that they and the directors for the time being should stand seised of the premises in trust to convey the same to such persons, being directors of the charity, as the directors, or the major part of them, should from time to time direct and appoint, with trusts for sale, and in the meantime till sale to occupy the premises, or such parts as should be deemed necessary, for a schoolhouse for teaching the poor children from time to time to be received into the *Tower Ward Schools* subject to the regulations of the directors for the time being; with a trust to lease such parts of the property as should not be used for the purpose aforesaid, and to pay the rents and profits to the directors, to be applied and disposed of for the benefit and general purposes of the charity. The school was subsequently transferred to another site, and in 1846, No. 91, *Great Tower Street* was leased to one *Craven* for a term of forty-two years at a yearly rent of £150.

On the 28th of March, 1882, an agreement was entered into for the sale of No. 91, *Great Tower Street*, by Alderman *Finnis* and the other trustees of the charity to *J. S. Forbes* and *H. D. Pochin* on behalf of the Metropolitan and District Railways Joint Committee.

The purchasers having objected that the concurrence or consent of the Charity Commissioners must be obtained, or otherwise that the sale must be made under the *Lands Clauses Act*, and the purchase-money be ascertained in accordance with the Act and paid into Court, the vendors took out this summons as to title.

E. Cooper Willis, Q.C. (*F. Cooper Willis*, with him), for the vendors:—

No doubt this property, which had been used for the purposes

of the *Tower Ward School*, is charity property, but, as the school has been supported by voluntary contributions entirely, and has no endowment whatever, it is by 16 & 17 Vict. c. 137, s. 62, and 18 & 19 Vict. c. 124, ss. 29, 48, exempted from the operation of the Acts, and the directors of the school have power to sell the property without the consent of the Charity Commissioners: *Royal Society of London and Thompson* (1).

Farwell, for the purchasers:—

The order of the Court in that case is prefaced by a declaration (2): "It having been proved to the satisfaction of the Court that the estate agreed to be sold was acquired by the Royal Society out of property which might be legally applied by such society as income, and did not form an endowment within the meaning of the *Charitable Trusts Acts*, 1853 and 1855."

But here there is no such evidence. It is recited in the deed of 1808 that the purchase-money was paid out of funds belonging to the charity, but, though the affidavit states that prior to 1808 the schools were supported by voluntary contributions, there is nothing whatever to shew that those funds did not come from some endowment of the charity, and not from voluntary contributions only. We are willing purchasers, but feel bound to submit that the vendors have not proved to the satisfaction of the Court that the money with which this property was acquired did not form an endowment within the meaning of the Acts of 1853 and 1855.

BACON, V.C.:—

In my opinion the affidavit is sufficient, and no inference can be drawn from any word in the affidavit that it was an endowment charity, and it cannot be disputed that if it is not an endowment charity the *Charitable Trusts Act* does not apply to it. It was perhaps not an inconvenient mode of taking upon lease a place that was used as a school. The time comes when they can sell that advantageously, and they do so, and the money comes back to their bankers or into their chest. The school is kept up by nothing but voluntary subscriptions. There is no trace of any

(1) 17 Ch. D. 407.

(2) 17 Ch. D. 415.

V.-C. B. 1883 FINNIS AND YOUNG TO FORBES AND POCHIN. (No. 2.)

endowment, there is not a trace of anything from which it can be inferred that this charity had anything in the shape of an endowment. If it had not, then it cannot be disputed that it is not within the *Charitable Trusts Act*, and the directors are at liberty to deal with it without the consent or concurrence of the Charity Commissioners. There can be no doubt there is a perfectly good title.

Farwell asked that the order might be prefaced with the same declaration as in *Royal Society of London and Thompson* (1).

BACON, V.C.:—I will put in the words "did not form an endowment" &c., but the other words in Vice-Chancellor *Hall's* order do not seem to apply to this case. I would rather not encumber it with words that are not necessary. The costs will follow the event.

Solicitors: *J. E. Shearman & Son; Burchells.*

F. G. A. W.

V.-C. B. 1883 *July* 6.

HARRISON *v.* LEUTNER.

[1879 H. 403.]

Practice—Taxation—Higher or Lower Scale—Rules of Supreme Court (Costs), August, 1875, *Order* VI.

In an action, which was dismissed with costs, to cancel an allotment of shares on the ground of fraudulent misrepresentation and suppression of material facts by the directors; to recover the amount paid upon the shares, and to be indemnified against the remaining balance—the fact that the pecuniary amount at issue was £110 only, and that the Plaintiff in issuing the writ had certified for the lower scale of costs, does not affect the discretion given to the Court by Rules of Supreme Court (Costs), August, 1875, Order VI., rule 3, to direct the costs payable by Plaintiff to be taxed on the higher and not on the lower scale.

ADJOURNED SUMMONS for review of taxation.

The action was brought by a holder of ten £10 and ten £1 shares in the *Wreck and Salvage Company, Limited*, on which he had paid £40, against the directors and the company (then in

(1) 17 Ch. D. 407.

liquidation) claiming a rescission of his contract to take shares on the ground that he was induced to become a shareholder by fraudulent misrepresentations, and suppression of material facts, in the prospectus, and the removal of his name from the list of contributories; an injunction to restrain proceedings to recover the unpaid balance (£70); repayment of the £40 with interest and all costs and damages, and an indemnity against all liability in respect of the shares.

The Plaintiff, when he issued the writ, took out a certificate for "lower scale" of costs, and several of the Defendants took, and paid for on the lower scale, copies of this certificate.

After a hearing which lasted five days Vice-Chancellor *Bacon* on the 13th of July, 1882, dismissed the action with costs, on the ground that it was wholly unfounded, without the least reasonable pretence for its institution, and that the only material facts upon which Plaintiff alleged a title to relief were wholly disproved by the evidence.

The Taxing Master had overruled the "lower scale" certificate and taxed the costs of the Defendants, the directors, upon the higher scale. Objections to the taxation having been lodged on behalf of the Plaintiff, the Taxing Master in his reasons for deciding against the objections stated:—

That having referred to the statement of claim he could not refer the relief therein sought to any of the definitions in R. S. C. 1875, Additional Order VI. (Costs), of the cases to which the lower scale of costs was applicable. Moreover, the claim to relief was based on the alleged fraudulent misrepresentations of the prospectus.

A summons to review the taxation had been taken out and was now adjourned into Court.

Chadwyck Healey, in support of the summons, referred to Rules of Supreme Court (Costs), August, 1875, Order VI., r. 1 (1 and 8), and submitted that as the sum in respect of which the claim was made was £40 only, the costs should have been taxed on the lower scale only. The mere fact that fraudulent misrepresentation was charged against the Defendants in the statement of claim is not a sufficient reason for directing the costs to be taxed

V.-C. B. 1883 HARRISON v. LEUTNER.

on the higher scale: *In re Terrell* (1). Even if the case does not fall strictly within the rules applicable to the lower scale, the Court has discretion under rule 3 of Order VI., to direct taxation on either scale, and, in the exercise of that discretion, costs on the lower scale only, for which the Plaintiff certified on the issue of his writ, ought to be allowed.

E. H. Fishbourne, contrà:—

Under similarly worded rules as to taxation in Chancery before the *Judicature Act* it has been held that where the issue was fraud or no fraud, and the difficulty and expense of the proceedings had no relation at all to the value of the property, the costs of the suit did not come within the lower scale, though the amount claimed was under £1000: *Earl of Stamford* v. *Dawson* (2); *Grimes* v. *Harrison* (3). The fact that the Plaintiff has certified for the lower scale does not prejudice the claim of the Defendants to have them taxed on the higher scale: *Flockton* v. *Peake* (4).

Chadwyck Healey, in reply:—

The Defendants have taken out copies of the certificate of lower scale, and are not entitled now to ask that the costs shall be taxed on the higher scale.

BACON, V.C.:—

The case here raised is of great importance, for if it is the law that a plaintiff may bring an action to recover £40, and at the same time make all kinds of charges of fraud and misrepresentation, and then by taking out a certificate of lower scale, escape the full penalty of costs, I am afraid the present Plaintiff's course of proceedings will soon be imitated, and we shall have more of this kind of actions than we have had before. The object of the rules was of course to proportion the costs to the magnitude of the action, but Order VI., r. 3, distinctly says that the Court or Judge may in any case "direct the fees set forth in either of the said two columns," that is to say either higher or lower scale, "to be allowed to all or either or any of the parties, and as to all

(1) 22 Ch. D. 473.
(2) Law Rep. 4 Eq. 352.
(3) 27 Beav. 198.
(4) 12 W. R. 1023.

V.-C. B. 1883 HARRISON v. LEUTNER.

or any part of the costs," thus clearly giving a wide discretion. Now I find that in this action a number of wholly unfounded charges were made against honest and respectable men by this Plaintiff, who claimed to be relieved of certain shares on the ground that he was induced to take them by misrepresentation. And considering the time it took at the hearing, I am of opinion that the Taxing Master has exercised a very proper discretion in taxing the costs on the higher scale. This is eminently a case in which the Plaintiff ought to pay the costs, which he has been ordered to pay, on the higher and not the lower scale. The summons must be dismissed with costs.

Solicitors: *G. Whale; John Ellerton.*

F. G. A. W.

V.-C. B. 1883 *July* 11.

SHURMUR *v.* SEDGWICK. CROSSFIELD *v.* SHURMUR.

[1882 S. 1841.]

*Post-nuptial Settlement—Conveyance by Husband and Wife of Wife's Separate Freeholds, and Demise by Husband of Wife's Separate Leaseholds—Subsequent Mortgage by Husband and Wife—Settlement held voluntary and void as against Mortgagee—*27 *Eliz. c.* 4, *s.* 1 [*Revised Ed. Statutes, vol. i. p.* 650].

A married woman, having become entitled under a will to freehold and leasehold property for her sole and separate use, joined her husband in making a settlement, whereby the husband and wife conveyed the freeholds, and the husband alone demised the leaseholds, subject to the annual payment of a shilling, if demanded, to trustees, upon trust for the wife for her separate use for life, remainder to the husband for life, remainder for the children (if any), with ultimate remainder to the wife absolutely.

Two years afterwards the husband and wife (there being no children of the marriage) made a mortgage of the property:—

Held, that the conveyance by the husband, though binding on the estate by the curtesy which he would have had in his wife's freeholds if there had been issue, in the absence of any conveyance by her was not sufficient to raise a consideration moving from the husband; and that the settlement was voluntary and void under the statute as against the mortgagee.

MATTHEW ROPER, who died on the 12th of August, 1876, by his will, dated the 28th of July, 1856, gave, demised, and

V.-C. B. 1883 SHURMUR v. SEDGWICK. CROSSFIELD v. SHURMUR.

bequeathed all his property of every description and wherever situate, and appointed all property over which he might have any power of appointment unto his daughter *Emily Sedgwick*, "now the wife of *Alfred Sedgwick*, for her own sole and separate use and benefit absolutely," and appointed her sole executor.

Probate was granted to *Emily Sedgwick* on the 18th of September, 1876.

By an indenture of settlement, dated the 29th of August, 1877, and made between *Alfred Sedgwick* of the first part, *Emily*, the wife of *Alfred Sedgwick*, of the second part, and *William Shurmur* and *James Speller* the younger, of the third part, after reciting that all the freehold hereditaments and premises described in the first schedule were formerly held by *Matthew Roper* for an estate of inheritance in fee simple in possession free from incumbrances; and that by an indenture of lease, dated the 26th of March, 1821, all and singular the leasehold premises described in the first item of the second schedule were demised to *Richard Palmer* for a term of ninety-four years and six months from the day next before the date of the indenture in recital subject to the rent and covenants therein reserved and contained; and that by divers mesne assignments and acts in the law, and particularly by an assignment dated the 30th of July, 1860, all and singular the said premises became vested in *Matthew Roper* for the residue of the term; and that by another indenture of lease, dated the 25th day of March, 1820, all and singular the leasehold premises described in the second item of the second schedule were demised to *Richard Dye* for the term of ninety-five years and six months from the 25th of March, 1820, subject to the rent and covenants therein reserved and contained; and that by divers mesne assignments and other acts in the law, and ultimately by an indenture of assignment dated the 3rd of February, 1863, all and singular the said last-mentioned premises became vested in *Matthew Roper* for all the residue of the term; and that by another indenture of lease, dated the 26th of February, 1858, all and singular the premises described in the third item of the second schedule were demised to *Edmund Roper* and *Matthew Roper* for a term of fifty years less three days from the 25th of December, 1857, subject to the rents and covenants therein reserved and contained; and that

by an indenture of assignment indorsed on the last-mentioned indenture all the interest of *Edmund Roper* in the said premises lastly described was assigned to *Matthew Roper;* and reciting the will and death of *Matthew Roper*, and probate of his will, and that "the said *Alfred Sedgwick* and *Emily Sedgwick* have agreed to execute the settlement hereinafter appearing;" it was witnessed that "in pursuance of the said agreement and in consideration of natural love and affection, they the said *Alfred Sedgwick* and *Emily* his wife, according to their respective estates and interests in the premises," did and each of them did grant and convey to *William Shurmur* and *James Speller*, their heirs and assigns, all and singular the freehold lands and hereditaments described in the first schedule with their appurtenances, and all the estate of them the said *Alfred Sedgwick* and *Emily* his wife of, in, or to the same respectively, to hold the said freehold lands and hereditaments to and to the use of *Shurmur* and *Speller*, their heirs and assigns, upon the trusts thereinafter declared; and it was further witnessed that *Alfred Sedgwick* thereby demised and leased to *Shurmur* and *Speller* all and singular the leasehold lands, messuages, and premises described in the second schedule, and all the estate of him the said *Alfred Sedgwick* in the same respectively, to hold to *Shurmur* and *Speller* for and during all the respective residues then remaining unexpired of the terms for which the same were holden, less the last ten days of each of the said terms, "subject to the payment of the yearly rent of one shilling if demanded," upon the trusts nevertheless thereinafter declared. These trusts were to pay to or permit *Emily Sedgwick* to receive during her life the rents and profits of the hereditaments contained in the first and second schedules for her sole and separate use and benefit, free from the control and debts of her husband, and her receipts to be sufficient discharges; and after her death upon trust for *Alfred Sedgwick* for life, and after the decease of the survivor, upon trust for the child or children of *Alfred* and *Emily Sedgwick* as *Emily Sedgwick* should by deed or will appoint, and in default of appointment for all and every the child and children of *Alfred* and *Emily Sedgwick* who should attain twenty-one or marriage; and in default of children upon trust if *Emily Sedgwick* should survive *Alfred Sedgwick*, for her

V.-C. B. 1883 SHURMUR v. SEDGWICK. CROSSFIELD v. SHURMUR.

absolutely; but if she should die in his lifetime upon such trusts as she should by will (notwithstanding coverture) appoint, and in default of appointment for such persons as under the *Statutes of Distribution* would have become entitled thereto in case *Emily Sedgwick* had died intestate and without having been married, in the shares in which they would have taken under the same statutes.

From the schedules it appeared that the freeholds consisted of two pieces of building-land at *Walthamstow, Essex*, on which houses and shops had since been built; and that the leaseholds consisted of pieces of land at *Bethnal Green*, on which also houses had since been built, and of a tenement and premises near the *Hackney Road*.

The action was commenced on the 24th of April, 1882, by the trustees, *Shurmur* and *Speller*, against *Alfred Sedgwick* and *Emily* his wife, and *Abraham Crossfield*, and the statement of claim, delivered on the 6th of May, 1882, stated that the Plaintiffs had lately discovered that by two indentures of mortgage dated on or about the 8th of April, 1879, the freeholds and leaseholds were mortgaged by Mr. and Mrs. *Sedgwick* to the Defendant *Crossfield* for sums of £500 and £700; and that *Crossfield*, on the 8th of July, 1881, had given notice in writing to the Plaintiffs of his intention to sell under the powers of sale in the mortgage deeds.

The Plaintiffs claimed to have the trusts of the settlement of the 29th of August, 1877, carried into execution under the direction of the Court, and for an injunction to restrain *Crossfield* from proceeding to a sale.

By one of the indentures of mortgage, dated the 8th of April, 1879, made between *Alfred Sedgwick* and *Emily* his wife, mortgagors, of the one part, and *Crossfield*, mortgagee, of the other part, after reciting that the testator was at the date of his will seised of the freeholds, and his will and death, and the probate, and that the mortgagors having occasion for the sum of £500 had requested the mortgagee to lend them that sum, and so forth, in consideration of the said sum of £500 advanced by the mortgagee, the mortgagors did, and each of them did, grant and convey the freeholds to the mortgagee, with proviso for redemption, and power of sale in the usual form.

By the other indenture of mortgage, of even date and between the same parties, after reciting the other leases and the ultimate assignments to the testator, and his will and death, and the probate, the mortgagors, in consideration of £700 advanced by the mortgagee, did, and each of them did, demise to the mortgagee all those the said several pieces of land, messuages, cottages, and hereditaments comprised in the said indentures of lease, to hold to the mortgagee for all the residues of the said terms respectively, except the last three days of each; subject to a proviso for redemption, and to a power of sale, with a proviso that upon any sale the mortgagors should stand possessed of the last three days of the terms upon trust for the purchaser.

On the 11th of May, 1882, the Defendants, Mr. and Mrs. *Sedgwick*, delivered a statement of defence, in which they said that *Alfred Sedgwick*, being in want of money for his business, with the consent of his wife, negotiated for a loan on the security of the properties. "Both the said Defendants at the time believed that the said indenture of settlement, being voluntary, was revocable" by them in favour of any *bonâ fide* purchaser or mortgagee for value. At the time of the execution of the mortgages they "honestly believed that they were acting properly and within their powers" in executing a mortgage as if no such settlement were in existence.

The Defendant *Crossfield*, by an amended statement of defence and counter-claim against the trustees and Mr. and Mrs. *Sedgwick*, averred that the indenture of settlement, if in fact made and executed, was ineffectual to pass the leasehold premises alleged to have been thereby demised, which belonged to the Defendant *Emily Sedgwick* for her separate use, and was moreover so made and executed without any consideration, and as against him was a fraudulent and covenous deed, and wholly void. He counter-claimed a declaration that the mortgages were valid and effectual as against such right or title in the mortgaged premises as the Plaintiffs might be entitled to under and by virtue of the settlement; also foreclosure, accounts, and payment by *Alfred Sedgwick*, and out of the separate estate of *Emily Sedgwick* of the two sums and interest.

By their defence to the counter-claim Mr. and Mrs. *Sedgwick* denied that the indenture of settlement under which the Plaintiffs

V.-C. B. 1883 SHURMUR v. SEDGWICK. CROSSFIELD v. SHURMUR.

claimed was a fraudulent deed, and fraudulent and void as against the Defendant *Crossfield*.

The Plaintiffs on the 17th of November, 1882, delivered a reply in which they submitted whether the settlement was ineffectual to pass the leasehold premises thereby demised, or was, as against *Crossfield*, or in fact, a voluntary deed, and fraudulent and void. They submitted that they would not have been justified without the sanction of the Court in treating the settlement as ineffectual for such purpose and void; and said they had been advised that they could not without the sanction of the Court safely acquiesce in the proposed sale by the Defendant.

There was no issue of the marriage.

A valuer named *Edward Brown* valued the freeholds at £816, the *Bethnal Green* leaseholds at £1333, and the *Hackney* property at £126—£2275 together.

The Defendants, Mr. and Mrs. *Sedgwick*, did not object to a sale. Another valuer, Mr. *James Wild Martin*, valued the freeholds at £960, the *Bethnal Green* leaseholds at £1600, and the *Hackney* leaseholds at £130—together £2690.

The Defendant *Crossfield* deposed that he first heard of the existence of the settlement on the 16th of February, 1881. On the 11th of July, 1881, he went into possession, in consequence of default in payment of interest. After doing so he served Mr. and Mrs. *Sedgwick* with notices of his intention to realize his securities, which notices expired on the 8th of January, 1882. Shortly afterwards he informed the Plaintiffs' solicitors of his intention to sell, and invited them to concur, but they declined.

Millar, Q.C., and *E. B. Michell*, for the Plaintiffs, submitted to act according to the direction of the Court.

C. H. Turner, for Mr. and Mrs. *Sedgwick*, submitted that, being advised that the settlement was voluntary and revocable, they were justified in making the mortgage.

BACON, V.C., called upon

Millar, to argue the case on behalf of the possible children of the marriage:—

In the event of children the husband would be tenant by the

curtesy. This right he gave up, and also his prospective right to his wife's leaseholds. These concessions raise a valuable consideration, sufficient to take the deed out of the statute of 27 Eliz. c. 4: *Teasdale* v. *Braithwaite* (1); *In re Foster and Lister* (2); *Hewison* v. *Negus* (3).

An assignment of leaseholds reserving rent and covenants is of itself a conveyance for valuable consideration: *Price* v. *Jenkins* (4); although it has been held, no doubt, that the decision has no bearing on a case under the statute of 13 Eliz. c. 5: *In re Ridler* (5). This is a case under the 27 Eliz. c. 4, as to which the case is still treated as having been well decided: *In re Ridler* (6).

Marten, Q.C., and *Joseph Beaumont*, for the mortgagee :—

The case of *Teasdale* v. *Braithwaite* was essentially different from this. The gift there was to a single woman, accompanied by an expression of wish that if she married she would settle the property to her separate use for life, and to such uses as she should by will appoint. The estate was either bound by this expression of wish, or it was not. If it was not bound, as Lord Justice *James* was inclined to think, then the husband's marital right would come in, and his giving up of these rights would raise a consideration; if it was bound, then the wife's separate estate would be in equity accompanied by a restraint upon anticipation, which would disable her from mortgaging. But here the gift is to a woman already married for her separate use. She has the absolute disposal just as if she were single, and in so disposing she has no need of the concurrence of her husband. As to the leaseholds he is a trustee for her, and can be compelled to carry into effect her wishes. So that under the settlement he is a mere volunteer. It may be a question since the *Judicature Act*, 1873, which says (36 & 37 Vict. c. 66, s. 25, sub-s. 11) that generally where there is any variance between the rules of equity and common law the rules of equity shall prevail, whether a wife to whom leaseholds have been bequeathed

(1) 4 Ch. D. 85; affirmed 5 Ch. D. 630.
(2) 6 Ch. D. 87.
(3) 16 Beav. 594.
(4) 5 Ch. D. 619.
(5) 22 Ch. D. 74, 82.
(6) Ibid. 81.

V.-C. B. 1883 SHURMUR v. SEDGWICK. CROSSFIELD v. SHURMUR.

for her separate use has a right of distress—but in any event there was no foundation here for any bargain, the husband had nothing to bargain with, so that what he gets under the settlement is purely voluntary.

Fettiplace v. *Gorges* (1789) (1) establishes the right of a married woman to dispose as she pleases of property given to her separate use; also that her surviving husband takes her leaseholds only as next of kin, not *jure mariti*. This extends to an equitable fee: *Taylor* v. *Meads* (2); and the settlement of a married woman, though made during coverture, is not exempt from the statute of 27 Eliz.: *Currie* v. *Nind* (3), followed in *Butterfield* v. *Heath* (4), and extended to the larger proposition of a conveyance by a married woman, the owner of an estate in fee simple, not acting under a power.

We do not impugn the doctrine of *Teasdale* v. *Braithwaite* (5) in the slightest degree. Our case is that the husband had nothing to bargain with, hence the settlement was voluntary, unless it be held valuable on the principle of *Price* v. *Jenkins* (6). But this was not an assignment of the leaseholds, only a demise, and the trustees undertake no liability beyond the nominal amount of 1*s*. Assuming that the husband is trustee for the wife, he is entitled to indemnity to the whole extent of her estate. There is no suggestion of any insufficiency, looking at the sworn statements as to the value, which take into consideration the amount of the ground rent. The husband and wife acted on the honest belief that the deed was revocable, and at least the children must be volunteers.

The only necessity for the husband joining was that he had the legal title. At least we are entitled to foreclose the husband and wife, and they are the only persons at present interested under the settlement.

Millar, in reply:—

The husband gave up at least his estate by the curtesy, which

(1) 1 Ves. 46.
(2) 4 D. J. & S. 597.
(3) 1 My. & Cr. 17.
(4) 15 Beav. 408.
(5) 4 Ch. D. 85; affirmed 5 Ch. D. 630.
(6) 5 Ch. D. 619.

attaches to property given to the separate use of the wife, as much as to any other of her freeholds of inheritance: *Cooper* v. *Macdonald* (1). The question is whether the husband has given up anything or not—the *quantum* is immaterial: *In re Foster and Lister* (2).

Marten, in reply, on *Cooper* v. *Macdonald*:—

The husband is entitled only if the wife does not dispose of the property by deed or will.

BACON, V.C.:—

The question is one under the statute of *Elizabeth*, which declares a voluntary conveyance to be void against a purchaser for value; and all I have to consider is whether this conveyance was voluntary, or was made for valuable consideration.

That this lady was seised to her separate use of this freehold estate and entitled for her separate use to these leaseholds is not questioned. Being possessed of the whole of the property for her separate use, she makes a settlement of it. She and her husband convey the freeholds, and the husband conveys the leaseholds; and it is beyond all doubt that if the husband had conveyed for anything like valuable consideration, it would have been out of the reach of the statute. The question therefore is, did the husband give up anything? It is said he was tenant by the curtesy. But suppose the wife sells her estate, what becomes of the husband's estate by the curtesy? If she mortgages and the mortgagee puts the property up for sale, who can interfere with his right? Certainly not the husband. Could a purchaser object that the husband's consent was not obtained? She was the sole and absolute owner of the property, and she and her husband have conveyed it. In my opinion he gave no consideration for the settlement, and so the case resolves itself into a very simple matter.

The authority of *Teasdale* v. *Braithwaite* (3) is quite consistent with the perfectly just principle that if the husband gives up anything the conveyance is one for value.

(1) 7 Ch. D. 288.

(2) 6 Ch. D. 87.

(3) 5 Ch. D. 630.

V.-C. B. 1883 SHURMUR v. SEDGWICK. CROSSFIELD v. SHURMUR.

Again, it is plain that the trustees here undertook no such obligation as arose in *Price* v. *Jenkins* (1). The nominal payment of 1*s.* is stipulated for, "if demanded"; and beyond that they are under no liability.

The mortgagee is clearly entitled to the benefit of his security, which he can enforce by foreclosure or sale. There will be a declaration that the mortgage is a valid security as against the trustees of the settlement, with an order for sale, all parties desiring it; out of the proceeds the mortgagee will take his principal, interest, and costs; then will be paid the costs of the Plaintiffs, as between solicitor and client, then the costs of the husband and wife; and any surplus will be held by the trustees upon the trusts of the settlement. The mortgagee will have the carriage of the order.

Solicitors: *Rooks & Co.*; *Martin & Banks*; *Ellis, Son, & Crossfield.*

J. B. D.

V.-C. B. 1883 *July* 30.

In re KNIGHT. KNIGHT *v.* GARDNER.

[1879 K. 30.]

Practice—Rules of Court, 1875, *Order* XXXVIII., *r.* 4—*Affidavit—Cross-examination—Costs.*

The direction in Rules of Court, 1875, Order XXXVIII., rule 4, that the party producing deponents for cross-examination upon their affidavits is liable in the first instance for the expenses of their attendance, is not confined to a cross-examination of the deponents before the Court at the trial of the action, but applies also to a cross-examination in proceedings before the Chief Clerk in Chambers, or before a special examiner.

IN this action, which was for the administration of the estate of *Edward Knight*, deceased, one *Richard Knight*, in answer to the usual advertisements which had been directed by the Chief Clerk, brought in a claim as heir-at-law of *Edward Knight*, and several persons had filed affidavits in support of his claim.

One of the Plaintiffs gave notice to cross-examine these

(1) 5 Ch. D. 619.

witnesses, and *R. Knight* took out a summons for the appointment of a special examiner. The question by whom the expense of producing these witnesses for cross-examination should be borne, having been raised, the summons was adjourned into Court.

Method, for *R. Knight*, submitted that he was entitled to call upon the party requiring production of the deponents for cross-examination to pay their expenses in the first instance, according to the former practice before the *Judicature Acts*, under Order of the 5th February, 1861, rule 19. Although that practice had been altered by the Rules of the Supreme Court, 1875, Order XXXVIII., rule 4, it had been recently held by *Chitty*, J., in Chambers (*Peat* v. *Latchford* (1)), that the old practice still survived in the ordinary case of an inquiry in Chambers, or before a special examiner, and that the new rule applies only to the production of deponents for cross-examination before the Court at the trial of the action.

Marten, Q.C., *contrà*, was not called upon.

BACON, V.C.:—

I cannot make this order. Order XXXVIII., rule 4, which applies to all proceedings whether at the trial of the action or elsewhere, is plain and distinct, and says that the party producing a deponent who has made an affidavit for cross-examination, "shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production." I cannot alter that rule. If I am asked for a reason, I say that when a man has filed an affidavit his evidence is incomplete and insufficient until his cross-examination is finished. The expenses of producing these witnesses for cross-examination must be borne in the first instance by *R. Knight*, the person on whose behalf the witnesses are produced.

Solicitors: *Jennings, Son, & Burton; W. S. Page.*

(1) May 25, 1883.

F. G. A. W.

V.-C. B.
1883
July 31.

In re BECK. *In re* CARTINGTON ESTATE.

Settled Land Act, 1882—*Sale by Tenant for Life—Solicitors' Remuneration Act*, 1881—*General Order—Solicitor's Remuneration in respect of Business connected with Sales—Auctioneer's Charges.*

Settled property which had been put up for sale by auction by the tenant for life under the *Settled Land Act*, 1882, but withdrawn for want of any sufficient offer, having been sold by private contract on the same day:—

Held, on summons by the trustees for the decision of the Court, that one charge, according to the scale set out in Part I. of Schedule 1 of the General Order under the *Solicitors' Remuneration Act*, 1881, was payable out of the purchase-money to the tenant for life's solicitor for conducting the sale, including the conditions of sale, and one charge for deducing the title and completing the conveyance, including the preparation of the contract; and that the costs of the concurrence in the sale by the mortgagees of the tenant for life, and a proper sum for the auctioneer's charges, were also payable out of the purchase-money.

ADJOURNED SUMMONS for the purpose of obtaining the direction of the Court as to payment of the costs of a sale of settled property by the tenant for life under the *Settled Land Act*, 1882.

In January, 1883, *W. A. Beck*, the tenant for life under the will of *Thomas A. Beck* of the *Cartington* estate, with the concurrence of his mortgagees, advertised the *Cartington* estate for sale by auction under the provisions of the *Settled Land Act*, 1882.

At the auction the property was withdrawn, no sufficient offer being made, but it was, on the same day, shortly after the attempted auction, sold by private contract, through the instrumentality of the auctioneer, for £37,500. Previously to putting up the property for sale by auction it was arranged between the vendor's solicitors and the auctioneer that the solicitors should draw the advertisements, conduct the advertising, prepare the particulars, and superintend the preparation of the plans, and that the auctioneer should receive ¼ per cent. on the purchase-money if the property was sold at the auction or afterwards through his agency.

Questions having arisen as to the payment of the costs and charges of the sale, this summons was taken out on behalf of the

trustees (and adjourned into Court) asking that they might be at liberty, out of the proceeds of sale of the estate, to pay the solicitors of the tenant for life a commission for conducting the sale of the *Cartington* estate by public auction, including the conditions of sale, and also a commission for deducing the title thereto, and perusing and completing the conveyance thereof, according to the scale set out in Part I. of the 1st Schedule of the General Order under the *Solicitors' Remuneration Act*, 1881; and also be at liberty to pay to the solicitors of the mortgagees of the tenant for life their proper charges in connection with the sale, according to the scale set out in the 2nd Schedule of the same order; and also be at liberty to pay or retain the proper charges of their (the applicants') solicitors in connection with this matter according to the last-mentioned scale.

Wolstenholme, for the trustees:—

The attempted auction and actual sale by private contract were really one transaction, and the solicitors for the tenant for life are therefore entitled to one commission only for conducting the sale and for deducing title to the property, and perusing and completing conveyance, and not to commission on the reserved price, and also to one half of the commission for negotiating the sales, according to rule 2 of the 1st Schedule of the General Order under the *Solicitors' Remuneration Act*, 1881. They are not entitled to repayment of the auctioneer's commission of $\frac{1}{4}$ per cent., as by the General Order, rule 4, the remuneration prescribed by Schedule 1 to the Order "is not to include auctioneer's or valuer's charges." The costs occasioned by the concurrence in the sale by the mortgagees must be paid by the tenant for life. Under the old practice the trustees would have been the persons selling, and the expenses of the mortgagees, whose concurrence in the sale was necessary, would have been paid out of the capital, but this rule no longer applies.

Shebbeare (*Hemming*, Q.C., with him), for the tenant for life:—

By the *Settled Land Act*, 1882, s. 53, the tenant for life, in exercising the powers of the Act, is in the position, and clothed with all the powers and duties, of a trustee; and, by sect. 21 (x.),

V.-C. B.
1883
In re BECK.
In re CARTINGTON ESTATE.

capital money arising under the Act may be applied in payment of costs, charges, and expenses of or incidental to the execution of the powers given by the Act. The vendor is therefore entitled to receive out of the purchase-money the costs and charges mentioned in the summons, *i.e.*, the commission for conducting the sale and commission for deducing the title and completing the conveyance, and, under rule 5 of Schedule 1 of the General Order, to the charges occasioned by the concurrence of the mortgagee's solicitor. We also submit that although by rule 4 the remuneration prescribed by Schedule 1 does not include auctioneers' charges, the vendor's solicitors should be allowed these charges, which have been paid by them pursuant to the arrangement made previously to putting up the property for sale.

BACON, V.C., holding that the attempted sale by auction and the actual sale by private contract must be treated as one transaction, directed that the trustees were to be at liberty to pay out of the purchase-moneys one commission for conducting the sale, including the conditions of sale, and also commission for deducing the title and perusing and completing the conveyance, according to the scale of charges contained in Schedule 1, Part I., to the General Order under the *Solicitors' Remuneration Act*, 1881; and also the costs occasioned by the concurrence in the sale of the tenant for life's mortgagees. The trustees were also to be at liberty to pay out of the purchase-moneys a proper sum to the auctioneer for his charges, which had been paid by the tenant for life, in addition to the scale payable to the solicitors.

MINUTES OF ORDER:—Let the applicants be at liberty out of the proceeds of sale of the above-mentioned *Cartington* estate to pay Messrs. *H. & M.*, the solicitors of the tenant for life *W. A. Beck*, his costs of the sale, on the principle that there is to be one charge according to the scale set out in Part I. of the 1st Schedule of the General Order made in pursuance of the *Solicitors' Remuneration Act*, 1881, for conducting the sale of the above-mentioned *Cartington* estate by public auction, including the conditions of sale, and one other charge, according to the same scale, for deducing the title to the said *Cartington* estate, including the preparation of contract for title. And Let the applicants be at liberty thereout also to pay to Messrs. *J. H. & P.*, the solicitors of the mortgagees of the said tenant for life, their proper charges in connection with the

said sale, according to the old system as altered by the 2nd Schedule to the said Order. And Let the applicants be at liberty thereout also to pay to (*the auctioneers*) a commission of $\frac{1}{4}$ per cent. on the amount of the purchase-money of the said estate for their charges of the sale. And Let them also be at liberty to pay or retain the proper charges of Messrs. *M. D. & Co.*, their solicitors in connection with this matter, according to the scale set out in the 2nd Schedule to the said General Order. Costs of all parties of this application to be taxed and paid and retained by the applicants out of the said proceeds of sale.

Solicitors: *Mills, Dowson, & Co.; Johnston, Harrison, & Powell,* agent for *Harrison & Milne, Kendal.*

F. G. A. W.

SMITH *v.* DUKE OF MANCHESTER.

[1883 S. 3322.]

Company—Directors—Application of Funds of Company—Ultrà Vires—Winding-up Petition.

A proviso in the articles of association of a company that the directors may "at any time direct any action or other legal proceedings to be commenced and prosecuted on behalf of the company in the name of the company or of such officer or other person as the directors may be advised; and may defend any action, &c., and may release, discontinue, or compromise any such action or other proceeding as they shall deem expedient; and they shall be indemnified out of the funds of the company against all costs, damages, and expenses, by reason of such action, suit, or proceedings," does not authorize the application by the directors of the assets of the company in paying the costs of a petition for winding up the company presented by themselves, but opposed by a number of the shareholders and a minority of the directors, and the costs of an appeal from the dismissal of such petition; and such intended application will be restrained as an act illegal and *ultrà vires*.

MOTION on behalf of the Plaintiff (suing on behalf of himself and all other the shareholders of the *Railway and Electric Appliances Company*) that an interim order of the 14th of July, 1883, restraining the Defendants (four of the directors of the company and their solicitors) from applying £500, part of the assets of the company, or any part of such sum, or any other of the assets of the company, in payment of the costs of a petition for winding up the company presented by the four directors and dismissed on the 7th of July, or in payment of the costs of prosecuting an

V.-C. B. 1883 SMITH v. DUKE OF MANCHESTER.

appeal from such dismissal, might be continued until the trial of the action or until further order.

The company, which was established for the purpose of acquiring and working certain patent rights held by two companies, of which the Plaintiff, *W. A. Smith*, had been chairman, was registered on the 31st of March, 1882, the contracts by which the patent rights of the vendor companies were acquired being dated the 26th and 28th of April, 1882.

At the close of 1882 it was found that no profit had been made by the company, but that there had been a heavy loss. Upwards of seventy-five actions had been brought by shareholders claiming a return of the moneys paid on their shares on the ground of misstatements in the prospectus, which had been prepared by the Plaintiff, *W. A. Smith*, who had been chairman of both the vendor companies, and also one of the chief promoters and a director of the *Railway and Electric Appliances* (the purchasing) *Company*.

In March, 1883, a committee of the directors (other than the Plaintiff and a Mr. *Arroll*) was appointed to investigate the relations of the company with the promoters. This committee came to the conclusion that the Plaintiff and his co-promoters had been guilty of grave misrepresentation and misconduct in the formation of the company and in procuring the adoption of the contracts for the purchase of the patent rights; and it was resolved at a board meeting held on the 15th of May, 1883, to commence an action against the vendor companies and the promoters (including the Plaintiff) for the purpose of setting aside the contracts of April, 1882, and also, in pursuance of the powers of art. 100, to present a petition for the liquidation of the company.

It was stated by the Plaintiff that the notice of this meeting summoned for the 15th of May, "on the general business of the company," was not received by him until it was too late for him to attend. At a previous board meeting, having been invited to resign his directorship, the Plaintiff declined, and requested that a meeting of the shareholders should be called, intimating that if this were done he believed he could outvote his co-directors and stop the proceedings threatened against him and his co-promoters.

The action was commenced on the 16th of May, and on the 17th of May a petition to wind up the company was presented in the names of the Defendants, the four directors who were members of the committee.

On the 7th of July the petition, which was opposed by *W. A. Smith* and certain of the shareholders, was dismissed with costs by Vice-Chancellor *Bacon*; and this dismissal has since been affirmed by the Court of Appeal on the 6th of August, 1883 (subsequently to the hearing of the present motion).

A meeting of the directors was held on the 13th of July, 1883, at which a resolution was proposed and passed that a cheque for £500 should be paid to Messrs. *Bompas, Bischoff, & Dodgson*, the solicitors of the company, for the purpose of providing for the costs of the petition and prosecution of an appeal from the dismissal of such petition. The Plaintiff entered a formal protest against any such payment as being illegal and improper, and on the following day (14th of July, 1883), commenced this action against the four directors (members of the committee) and Messrs. *Bompas, Bischoff, & Dodgson* for the purpose of restraining this intended application of the assets of the company.

An interim injunction having been obtained, the motion was now renewed by the Plaintiff.

Art. 100 of the articles of association, on which the Defendants the directors relied, was as follows: "The directors may from time to time, as occasion shall require, direct any action or other legal proceedings to be commenced and prosecuted on behalf of the company in the name of the company, or of such officer or other person as the directors may be advised, and may defend any action, suit, or other proceeding that may be brought or prosecuted against the company, or any of the officers thereof, and may release, discontinue, become nonsuit in, settle, or compromise any such action or other proceeding as they shall deem expedient, and they shall be indemnified out of the funds of the company against all costs, damages, and expenses by reason of such action, suit, or proceedings."

Marten, Q.C., and *Northmore Lawrence*, in support of the motion:—

It is impossible to conceive a more illegal application of the

V.-C. B. 1883 SMITH v. DUKE OF MANCHESTER.

funds of the company than for the directors to join together, and, without summoning a meeting of the shareholders, to vote that these assets should be applied in payment of the costs of the petition, for which they are personally liable, and in prosecuting an appeal from that decision. It is not a mere matter of internal arrangement, but an act distinctly *ultrà vires*, in restraint of which the Court will interfere at the instance of a dissentient shareholder suing on behalf of himself and all other shareholders: *Hoole* v. *Great Western Railway Company* (1); *Bloxam* v. *Metropolitan Railway Company* (2); *Holmes* v. *Newcastle-upon-Tyne Freehold Abattoir Company* (3). The Defendants will rely upon article 100, but that article applies only to proceedings carried on for the benefit and for preserving the life of the company, and not to proceedings for the purpose of putting an end to the company; and in any case, so far as it is inconsistent with the conditions stated in the memorandum of association, it cannot be relied on by the Defendants: *Guinness* v. *Land Corporation of Ireland* (4). We say that the meeting of the 15th of May, 1883, at which it was resolved to present a petition for winding up the company, was irregular, inasmuch as it was held without due notice and without any statement of the purpose for which it was summoned.

T. H. Carson (*Millar*, Q.C., with him), for the Defendants:—

The directors have been acting in a perfectly *bonâ fide* manner, and the proposed application of the assets was not illegal or *ultrà vires*. Having regard to the position and prospects of the company it was impossible that the company could be carried on successfully, and the petition to wind up was a proceeding which the directors were advised was for the benefit and in the interests of the company, and therefore came within the powers given to them by article 100, and they are entitled to be indemnified out of the funds of the company against the costs of the proceedings.

W. S. Owen, for Messrs. *Bompas, Bischoff, & Dodgson*:—

The solicitors are unnecessary parties, and are entitled to their

(1) Law Rep. 3 Ch. 262.
(2) Ibid. 337.
(3) 1 Ch. D. 682.
(4) 22 Ch. D. 349.

costs. They have not received the cheque, and pending these proceedings have no intention of doing so.

A reply was not heard.

BACON, V.C.:—

If what has been done by the Defendants is *ultrà vires*, the Plaintiff is unquestionably entitled to sustain his suit. That is not in dispute. Reliance is placed by the Defendants on article 100 of the articles of association, and because that article authorizes proceedings to be taken on behalf of the company, it is endeavoured to make out that what these directors have done, proceeding in their own name, and for their own interest alone, is a proceeding on behalf of the company. The statute enables a company to take its own proceedings for winding-up, but then there must be a meeting of the shareholders, and the shareholders would have a right to vote upon the very important question of whether this company should be destroyed or not. Without saying anything more than is now necessary as to the manner in which that meeting, which is so much relied on, was called, the imperfect notice that was given, and the more than imperfect intimation in the summons that it was for general business, have satisfied me that this proceeding is not on behalf of the company, but that it is by these directors, who have taken a mistaken view, according to my notion, of their rights and the conduct which they ought to have pursued. When I am told they have taken the advice of persons, and have deliberated among themselves, all I can say is, that I cannot attend to that, because most persons who are litigants do take very sanguine views of their own expectations, and persuade themselves that what they are doing is right. Therefore, upon both grounds, first, the imperfectness of the summons—for that is more important than the other—and, secondly, that this is an act done by these directors in their own persons, not on behalf of the company and wholly *ultrà vires*, I must make the order which the notice of motion asks me to make. What was done by these individual shareholders, who happen also to be directors, was not done on behalf of the company, is not justified by the 100th article of the

V.-C. B. 1883 SMITH v. DUKE OF MANCHESTER.

articles of association, the meeting which was afterwards (15th of May) held was imperfectly called, and the resolution was imperfectly passed, and ought not to be acted upon. I grant the injunction moved for in the terms expressed in the notice of motion.

As against the solicitors I make no order. Nothing could be more fair, as might have been expected from their reputation and knowledge, than the conduct which they have pursued. I adopt what they themselves have said that the cheque is not to be received by them and not to be taken away from the company, as it is part of the assets, and therefore part of the property of the Plaintiff who is suing in this action, together with the other persons interested.

Solicitors: *Hollams, Son, & Coward*; *Bompas, Bischoff, & Dodgson.*

F. G. A. W.

V.-C. B. 1883 *Aug.* 3.

In re PERCY.

PERCY *v.* PERCY.

[1882 P. 1951.]

Will—Construction—Absolute Gift—Interest.

Under a gift by *A.* to his wife of £10,000 "afterwards to go to the understated residuary legatee *E.*":—

Held, that the legacy of £10,000 was given to the wife absolutely, but that interest upon such legacy did not begin to run until after one year from the testator's death.

HUGH JOSCELINE PERCY, who died on the 9th of February, 1882, by his will dated the 18th of February, 1879, made the following disposition: "I give to my wife (whether legally acknowledged or not), formerly *Annie Story*, ten thousand pounds (£10,000), afterwards to go to the understated residuary legatee *Edward Josceline*; to my daughter (legitimate or not so legally) *Mary Josceline Percy* ten thousand pounds (£10,000), and *Agnes Ellen Josceline* ten thousand pounds (£10,000); and all the rest and residue of my property, whether real or personal, I give and devise to my son (legitimate or not legally) *Edward Josceline*, his heirs, executors, administrators, and assigns."

The Chief Clerk having found that the legacy of £10,000 was given to the testator's widow for life, and on her death to *Edward Percy* (in the will named *Edward Josceline*), and that she was entitled to have interest only from a year after the testator's death, this summons was taken out on behalf of the widow (and adjourned into Court) for the purpose of varying the certificate.

A. Rumsey, for the widow:—

The gift of £10,000 to the testator's widow is complete and absolute, and the superadded words "afterwards to go, &c.," being incompatible and inconsistent with the absolute interest already given, must be rejected as void, and cannot have the effect of reducing it to a life interest: *Byng* v. *Lord Strafford* (1); affirmed *nom. Hoare* v. *Byng* (2); the rule of law being that where the absolute interest is given in personal estate there can be no further gift of it: *Sugden's* Law of Property (3); *Williams* on Executors (4); *Theobald* on Wills (5). And in this respect *Byng* v. *Lord Strafford* is not only a decision on the actual word "afterwards," but a leading case on the general principle, and so recognised: *Watkins* v. *Williams* (6).

[He also referred to *Ross* v. *Ross* (7); *Green* v. *Harvey* (8); *Perry* v. *Merritt* (9).]

Morshead, contrà:—

The case must be decided on the clear and plain words of the will, which, when read as a whole, amount to a gift of £10,000 to the widow for her life, with remainder to the residuary legatee. *Hoare* v. *Byng* is distinguished, as in that case the gift was preceded by two distinct gifts for life.

BACON, V.C.:—

Looking to all the words of the will, and giving them nothing but a reasonable construction, the testator has given in language not to be mistaken, and in words of legal significance, an absolute

(1) 5 Beav. 558.
(2) 10 Cl. & F. 508.
(3) Pages 356, 357.
(4) 8th Ed. vol. ii. pp. 1086, 1111, 1271.
(5) 2nd Ed. p. 473.
(6) 3 Mac. & G. 622.
(7) 1 Jac. & W. 154.
(8) 1 Hare, 428.
(9) Law Rep. 18 Eq. 152.

V.-C. B. 1883 *In re* PERCY. PERCY *v.* PERCY.

legacy of £10,000 to his widow; and in the subsequent words, "afterwards to go, &c.," he has merely used inept words which do not affect the preceding absolute gift. The widow is entitled to this sum of £10,000 absolutely, to do what she likes with it, and the Court cannot give effect to any subsequent intention with respect to the property after her death.

A. Rumsey asked for interest from the death of the testator, on the ground that the legatee was his wife and not a stranger.

BACON, V.C.:—

The testator does not seem to have been sure about it. The legacy is subject to the ordinary rule, and interest does not begin to run until after one year from the testator's death.

Solicitors: *Tylee & Co.*

F. G. A. W.

V.-C. B. 1883 *Aug.* 4.

BELL *v.* SUNDERLAND BUILDING SOCIETY.

[1881 B. 5286.]

Mortgagor and Mortgagee—Bankruptcy of Mortgagor—Purchase by Trustee in Bankruptcy of Mortgaged Estate—Right of Second Mortgagee.

A trustee in bankruptcy does not by purchasing from the first mortgagee of the bankrupt extinguish the first mortgage, and make the second mortgagee the first incumbrancer on the estate.

But such a purchase does not extinguish the right of the second mortgagee to redeem.

ON the 19th of November, 1874, *John Brown* mortgaged a leasehold house to the trustees of the first Defendants, a building society at *Sunderland* called *The Eleventh Working Men's Benefit Building Society.*

On the 17th of June, 1881, *Brown* made an acknowledgment in writing of indebtedness to the Plaintiff, *Thomas Charles Bell,* and charged the above property with the debt, subject to the prior incumbrance.

On the 28th of July, 1881, *Brown* filed a liquidation petition, and the second Defendant, *Richard Bailey,* was appointed trustee.

On the 2nd of September, 1881, the trustees of the society put the property up for sale, but did not effect a sale.

On the 8th of September, and again on the 14th of September, 1881, the Plaintiff wrote to the secretary of the society offering to redeem the property. No answer was sent, but on the 21st of September, 1881, the secretary of the society wrote to the Plaintiff to say that the house had been sold "to Mr. *Bailey* the trustee."

On the 30th of September, 1881, the writ was issued against the society and *Bailey*, for an account of what was due under the mortgage of the 17th of June, 1881, and for a declaration that the purchase by *Bailey* as trustee enured for the benefit of the Plaintiff, and that he was entitled to stand as first mortgagee.

By an indenture dated the 28th of October, 1881, in which *Richard Bailey* was described as an accountant, and which contained no reference to the liquidation proceedings, in consideration of £125 paid by *Bailey* to the trustees, the property was conveyed to *Bailey* absolutely, free from all equity of redemption under the deed of the 19th of November, 1874; and the trustees covenanted against incumbrances.

On the 29th of October, 1881, *Bailey* made a conveyance by way of mortgage of the property to the third Defendants, another building society at *Sunderland*.

By the amended statement of claim, which was against the first mentioned building society, *Richard Bailey*, and his mortgagees, the Plaintiff claimed a declaration that he was entitled to a first charge for the amount owing to him on the incumbrance of the 17th of June, 1881, and an account and payment accordingly; and in default, foreclosure; or, in the alternative, if the Court should not think him entitled to such a declaration, then that he was entitled to redeem the Defendants.

By a statement of defence, delivered on the 14th of January, 1882, the Defendant *Bailey* did not admit the Plaintiff's alleged charge of the 17th of June, 1881, and said that the debt, if any, was an antecedent debt, and the security a fraudulent preference. He said he had no notice when he contracted to buy the premises from the society of any offer having been made by the Plaintiff to redeem. He submitted that he was, either as trustee,

V.-C. B. 1883 BELL v. SUNDERLAND BUILDING SOCIETY.

or, if he should be deemed not to have had authority as trustee to make the purchase, and if the Court or the creditors should refuse to ratify the purchase, then on his own account, entitled to the premises, free from any claim on the part of the Plaintiff.

In an affidavit, filed on the 12th of April, 1882, in answer to interrogatories, the Defendant *Bailey* said: "I purchased the said property as trustee under the liquidation of *John Brown*, and not on my own private account, but I took a conveyance of the same in my own proper name, not describing myself as trustee. Such purchase was duly authorized by a resolution of the committee of inspection passed on the 10th of September, 1881, which, so far as it is material, is in the words following 'That the trustee be and is hereby authorized' to purchase the property of the debtor from the building society for the sum of £125."

The first Defendants were dismissed before the hearing.

S. Hall, for the Plaintiff:—

The result of the trustee's action is that the Plaintiff is deprived of his security. It is not lawful for a trustee in bankruptcy to purchase a mortgaged estate from the first mortgagee of the bankrupt. The Plaintiff offered to redeem.

On the principle of *Otter* v. *Lord Vaux* (1) the trustee cannot by purchasing the estate defeat the Plaintiff's title; and the effect of his purchase is to make the Plaintiff the first incumbrancer.

If not, the trustee's conduct amounts to a breach of trust, and he cannot defeat the Plaintiff's right to redeem.

Bunting, for the trustee:—

In effect the Plaintiff asks the Court to hold that if a trustee in bankruptcy pays off the first mortgage, the creditors lose their priority. *Otter* v. *Lord Vaux* is out of the question. It was not a case in bankruptcy. There it was the mortgagor himself who purchased the estate, and thus extinguished the first mortgage. Here the trustee in bankruptcy buys by the direction and for the benefit of the creditors. If any advantage results from that, it accrues for the benefit of the creditors, not of the second mortgagee: *Cracknall* v. *Janson* (2).

(1) 6 D. M. & G. 638. (2) 6 Ch. D. 735.

Smart, for the third Defendants.

BACON, V.C. :—

What has taken place in this matter has resulted in a curious sort of juggle; but in my opinion the contention of the trustee cannot prevail. The trustee has all the rights of the bankrupt mortgagor, but he has no other rights. He cannot, any more than the bankrupt mortgagor himself can, defeat the rights of the bankrupt's mortgagee.

At the same time nothing that has been done or left undone can neutralize the first mortgage. The Plaintiff cannot say he is the first, and not the second, mortgagee.

The result is that the trustee stands in the position of transferee of the first mortgage, and the third Defendants are sub-mortgagees of the trustee. The Plaintiff is entitled to redeem as second mortgagee, and the decree will be in the ordinary form on that footing.

The trustee will pay the costs of the action in which he has throughout denied the Plaintiff's right.

Solicitors for Plaintiff: *Brownlow & Howe*, agents for *E. Clark, Newcastle.*

Solicitors for the Defendant *Bailey: Hickin & Graham*, agents for *T. F. Brown, Sunderland.*

Solicitors for third Defendant: *Belfrage & Co.*, agents for *William Halcro, Sunderland.*

J. B. D.

FRY, J.
1883
March 15.

BOYD *v.* ALLEN.

[1883 N. 167.]

Partition—Jurisdiction—Power of Sale.

A decree for the partition of property can be granted notwithstanding the existence of a power given to trustees to sell the property for the purpose of a division.

THIS was a partition action.

Adam Norris by his will, dated 16 July, 1853, gave all his property to trustees upon trust as to his personalty for conversion, and as to his realty and residuary personalty upon trusts for his sons and daughters as therein mentioned. And he empowered his trustees, for the purpose of satisfying his debts, or for the purpose of a division of his property, or for any other purpose (but if not for the purpose of satisfying his debts or for the purpose of a division, with the written consent of the major part of his sons and daughters then living and entitled to shares of his said estates), absolutely to sell his real estate or any part or parts thereof by public auction or private contract, and to invest the proceeds as therein mentioned.

The Plaintiff, who was beneficially entitled to four-fifteenths of the real estate, asked for the usual partition decree, and the Defendants raised the question whether the Court had jurisdiction where there was a power to sell.

Glasse, Q.C., and *E. S. Ford*, for the Plaintiff:—

The partition decree may be granted by the Court, although there is a power for sale. Where there was a trust for sale it was held that the Court would not decree partition: *Biggs* v. *Peacock* (1); but a power being discretionary should be no bar to the jurisdiction. This was so stated by *Pearson*, J., in *Re Norris* (2), and though the decision was reversed on appeal on a point of construction, this *dictum* was not questioned.

(1) 20 Ch. D. 200; 22 Ch. D. 285. (2) Weekly Notes, 1883, pp. 35, 65.

Everitt, Q.C., and *W. W. Cooper*, for the Defendants :—

It has been decided that the Court has no jurisdiction where there is a trust for sale, and a discretionary power ought to stand on the same footing, and ought not to be interfered with by a partition decree.

FRY, J.:—

In my opinion the existence of a power of sale in trustees is no bar to a decree for partition. The authorities are reasonably plain, but independently of authority it appears to me that the right of partition, which is an incident to the property in an undivided share, is not taken away by a discretionary power of sale given to trustees. It is suggested that I ought not to override a power given to the trustees; but as they did not think fit to exercise their power before the Plaintiff exercised his right to ask for a partition from the Court, it does not appear to me that the persons to whom the property is given are deprived of their right in this Court. If the action were brought vexatiously, or when the trustees were about to exercise their power, I might view the case differently.

Solicitors: *Chester & Co.; J. J. & C. J. Allen.*

C. W. C.

KAY, J.

1883

June 5.

HALLETT to MARTIN.

Will—Power to lease—Building Leases—Ordinary Leases—Invalid Lease—Deviation from Terms of Power—Contract for Grant of valid Lease under 12 & 13 *Vict. c.* 26 [*Revised Ed. Statutes, vol. x. p.* 605]*—Option to purchase.*

A testator by his will devised and bequeathed freehold and leasehold lands upon trusts, and empowered the trustees to contract for leases thereof with or without optional powers of purchase in the lessees, and to grant leases thereof either for building or other purposes, so that no lease of the site of a building should be made for more than ninety-nine years, and no lease for any other purpose for more than twenty-one years, and so that while leases for twenty-one years were to be at the best rents which could be obtained, building leases might be at a rent to increase progressively. After the testator's death the trustees granted to *A. B.* a lease of part of the freehold and leasehold lands of the testator for thirty-five years, with an option to purchase during the first twenty-one years of the term, and at an increasing rent as to the freehold part, by an indenture which recited that they had power to grant building leases, but contained no covenant to build, though it contained covenants to repair, amend, and keep, and to insure all messuages erected or to be erected on the land demised.

A. B. exercised his option to purchase as to a leasehold portion of the demised property, which was duly assigned to him, and he afterwards sold and assigned part of those leaseholds to *C. D.* *C. D.* contracted to sell to a purchaser, and in order to avoid any question as to the validity of the lease by the trustees, a memorandum was indorsed upon it signed by *A. B.* and the trustees declaring that pursuant to the Act 12 & 13 Vict. c. 26, the lease should be considered in equity as a contract for the grant of a valid lease for twenty-one years. The purchaser, however, took the objection that the lease was invalid.

Upon a summons taken out under the *Vendor and Purchaser Act* of 1874:—

Held, that the lease though intended to be a building lease was invalid as such, owing to the absence of any covenant to build, and that being bad as a building lease under the power it could not by the operation of 12 & 13 Vict. c. 26, be turned into a contract for the grant of a valid lease of a kind different from that which it was originally intended to be; moreover, that even if it could by this means be turned into an ordinary lease, it would be bad as such, inasmuch as the rent reserved on the freehold part was an increasing rent, which was not authorized by the power to grant ordinary leases:—

Held, also, that as there was no power to grant an option to purchase otherwise than in a valid lease under the power, and the lease granted was invalid, the option to purchase must fall with the lease.

WILLIAM HALLETT, who died in April, 1862, by his will devised and bequeathed freehold and leasehold lands to trustees,

upon trusts therein mentioned; and empowered the trustees as follows, viz.: "from time to time and at any time during the continuance of any of the trusts aforesaid . . . . to contract with any person or persons for a lease or leases of any part or parts of the said respective trust premises hereinbefore devised and bequeathed with or without an optional power of purchase in the lessee; and also to make and execute any lease or leases thereof, either for the erection of any building or buildings, or for any other purpose whatsoever, for such term or terms of years, under such rents, and with such covenants, clauses, provisoes, stipulations, and agreements, as my said respective trustees shall think reasonable and proper, but so nevertheless that no lease of the site of any messuage or other building or work, with suitable yards, gardens and other conveniences, be made for any longer term than ninety-nine years, and that no such lease to be made for any other purpose be made for any longer term than twenty-one years, such terms of years respectively to commence and take effect in possession on the granting of the lease or within twelve calendar months thereafter, and not otherwise in reversion or by any way of future interest, and so that upon each and every such lease there be reserved the best and most improved yearly rent or rents that can or may be reasonably had or gotten for the same, having regard to the covenants therein contained on the part of the lessee. But I hereby expressly declare that the rent or rents to be reserved in any such building lease may during the first two years of the term thereby granted be of a nominal amount, and may be made to increase progressively if my said trustees shall think proper, and so that no fine, premium, or foregift be had or taken for the making or granting of any such lease or for any contract for the same, and so that in every such lease there be contained a condition for re-entry on non-payment of the rent or rents to be thereby reserved by the space of twenty-one days next after the same shall become payable, and so that the lessee or lessees in every such lease do execute a counterpart thereof: Provided always, that it shall be lawful for my said trustees to rescind or abandon or to vary the terms of any contract which shall be entered into by them for the granting of any such lease as aforesaid."

KAY, J.
1883
HALLETT TO MARTIN.

By an indenture of lease dated the 8th of May, 1882, after reciting that the parties thereto of the first part (who were the trustees of the will) were devisees in trust under the testator's will of the piece of freehold land first thereinafter described (containing nearly twenty-eight acres), and were also trustees for the residue of a term of ninety-nine years of the piece of leasehold land secondly thereinafter described (containing nearly thirty-eight acres), and that the trustees had "power under the said will of granting building leases for any term not exceeding ninety-nine years, with purchasing clauses," the trustees demised and leased the said two pieces of land to *John Chester Craven* for the term of thirty-five years from the 25th of December then last, yielding and paying therefor unto the lessors for the first quarter of the year the rent of one peppercorn for both the said pieces of land, and thereafter, as to the piece of land first described, for seven years from the 25th of March then last the yearly rent of £275 5*s.*, for the next seven years, the yearly rent of £412 7*s.* 6*d.*, and for the residue of the said term the yearly rent of £688 2*s.* 6*d.*, and for the piece of land secondly described throughout the term the yearly rent of £125.

This indenture contained no covenant by the lessee to build, but it contained a covenant by him to pay and discharge all rates, taxes, payments, and outgoings then or thereafter to become payable in respect of the demised premises "or any buildings to be erected thereon," except landlord's property tax, and at his own cost to do all work relative to sewers, roads, and foot-pavements, for or in respect of the lands demised, or in respect of any buildings which might be erected thereon; a restrictive covenant by him as to the user of the demised lands, "or any messuages or buildings which might be erected thereon;" a covenant by him that he would "from time to time and at all times well and substantially repair, support, amend, and keep all messuages and buildings erected or to be erected on any and every part of the said pieces of land, and all walls and fences erected or to be erected on the said pieces of land, with all necessary reparations and amendments whatsoever;" and a covenant by him to insure "all messuages and buildings erected or to be erected on the pieces of land thereby demised for the full insurable value thereof."

It further contained a clause to a proviso that the lessee should be at liberty at any time during the first twenty-one years of the said term to have conveyances of any portion of the said freehold piece of land at the rate of £600 per acre, but no purchase was to be for a less aggregate purchase-money than £1000, though the land purchased at any one time might be in more than one conveyance; and the lessee might during the said twenty-one years purchase the said leasehold piece of ground for £3000, subject to a ground rent of £20 per annum, and to the lessee's covenants in the original lease contained. And this clause concluded, "When the said lessee shall have laid out the whole or any portion of the land for building he shall furnish the said lessors with a plan or tracing of the whole, or of such sections, on a sufficient scale, in order that the pieces of land when conveyed may be marked off thereon."

J. C. Craven entered into possession of the demised lands, and on the 18th of August, 1882, gave the trustees notice in writing that he elected to purchase the leasehold piece of ground so demised to him for thirty-five years, for all the residue of the term for which the trustees held it under the original lease, subject to the rent thereby reserved, at the price of £3000. And by an indenture dated the 28th of September, 1882, this piece of ground was assigned to him accordingly.

It appeared that doubts were subsequently entertained whether the above-mentioned lease was a valid exercise of the power, and accordingly a memorandum signed by the lessee and the lessors, and dated the 22nd of December, 1882, was indorsed upon the indenture of lease with the view of taking advantage of the statutory aid to defective leases afforded by the Act 12 & 13 Vict. c. 26. This memorandum which recited the power, that the lease was granted in the intended exercise of the power, "that it had been suggested that the said lease was invalid by reason of deviations from the terms of the said recited powers, such deviations being that the term granted thereby is longer than twenty-one years," and that *J. C. Craven* had entered under the lease; and it thus continued: "Now be it remembered that pursuant to the Act of Parliament made and passed," &c., intituled "An Act for granting relief against defects in leases made under

KAY, J.
1883
HALLETT
TO
MARTIN.

powers of leasing in certain cases," and by "virtue of every other authority or interest enabling me in this behalf, I, the said *J. C. Craven* (with the knowledge of the lessors testified by their respective signatures hereunder) do hereby elect and declare that the within written lease shall (if and so far as it is invalid by reason of any deviation, whether hereinbefore referred to or not, from the terms of the power in the intended exercise of which it was granted) be considered in equity as a contract for a grant at my request, or that of my executors, administrators, or assigns, of a valid lease under the last-mentioned power, the same to take effect as regards the term thereby granted as and from the within-mentioned twenty-ninth day of September, one thousand eight hundred and eighty-one, to contain a like optional power of purchase, and incidental and other provisions as that and those which are within written and expressed, and to be otherwise to the like purport or effect as the within written lease, save so far as any variation may be necessary in order to comply with the terms of such last-mentioned power."

Craven afterwards, on the 29th of December, 1882, sold and assigned part (consisting of about twenty acres) of the leasehold land comprised in his lease to *F. H. Hallett* for the residue of the original term of ninety-nine years and discharged from the ground rent of £20.

Prior to his purchase, viz., on the 9th of October, 1882, *F. J. Hallett* had entered into an agreement with the trustees of the *Brighton Race Stand* for the sale to them of four acres of the leasehold land which he subsequently purchased as above mentioned; and when after his purchase he delivered to them an abstract of his title they took (*inter alia*) the objection that the lease granted by the trustees of the will was not a building lease, because it contained no covenant to build, and was not good as a lease "for any other purpose," as it was made for longer than twenty-one years and with a progressive rent, and thus that the whole agreement on which the lease was founded, and with it the option to purchase, was void as *ultrà vires*. *F. J. Hallett* then took out a summons under the *Vendor and Purchaser Act*, 1874, to have it declared that this and certain other requisitions had been sufficiently answered, and that a good title could be shewn

to the property in accordance with the terms and provisions contained or implied by law in the contract.

Pearson, Q.C., and *Renshaw*, for the vendor, in support of the summons:—

Under the Act 12 & 13 Vict. c. 26, when a lease has been granted *bonâ fide* which is invalid by reason of any kind of deviation from the terms of the power, and the lessee has entered thereunder, such lease shall be considered in Equity as a contract for a grant at the request of the lessee of a valid lease under the power to the like purport and effect as the invalid lease, but with such variations as may be necessary in order to comply with the terms of the power. If, therefore, this lease was invalid as a building lease under the power, the defect has been remedied by the provisions of this Act, and the lease operates as a binding contract for the grant of a valid lease for "other purposes" for the term of twenty-one years.

[They also cited *Sugden* on Powers (1) and 13 & 14 Vict. c. 17.]

Robinson, Q.C., and *C. T. Simpson*, for the trustees of the *Brighton Race Stand*, the purchasers:—

The trustees of the will had two distinct powers of leasing, and might either have granted building leases at progressive rents for terms not exceeding ninety-nine years, or agricultural or other leases at rack rents for terms not exceeding twenty-one years. But the trustees have not complied with the terms of either of their powers. The lease they granted was bad as a building lease, because it contained no covenant to build: *Jones* v. *Verney* (2); and it was bad under the power to grant other leases as being for a term exceeding twenty-one years. And it is said that being bad as a lease of one kind, the indorsement has made it good as a contract for a lease of another kind; but this is not the sort of defect which can be cured by the operation of the Act 12 & 13 Vict. c. 26.

[They also referred to *Farwell* on Powers (3).]

Renshaw, in reply.

(1) 8th Ed. p. 571. (2) Willes, 169. (3) Page 285.

KAY, J. 1883 HALLETT TO MARTIN.

KAY, J.:—

I am afraid I must allow the objection, and I do so with the utmost reluctance, because my inclination is, as far as I can, to make it possible for the parties to carry out a purchase and sale of this kind, as the matter seems entirely *bonâ fide*.

In this case, there were two powers of leasing in the will of the testator, one to grant ordinary leases for twenty-one years and the other to grant building leases for a longer term than twenty-one years; the building leases might have increasing rentals, but the other leases were to be at the best rents that could be obtained in the ordinary way, and either kind of lease might contain an option of purchase. This being so, a lease was granted reciting that the lessors were devisees in trust under the will, and that the trustees had power under the said will of granting building leases for any term not exceeding ninety-nine years, with purchasing clauses. That is the only reference I can find to the power at all. Then two pieces of land were demised, one a piece of freehold land and the other a piece of leasehold land, as I gather, partly adjoining, for a term of thirty-five years, which term was longer than the trustees had any power to grant except as a building lease. Then I find that as to both pieces of land for the first quarter of the year there was to be a rent only of a peppercorn, and thereafter as to the freehold land for seven years £275 5*s.*, for the next seven years £412 7*s.* 6*d.*, and for the residue of the term £688 2*s.* 6*d.*; and for the leasehold part of the land from the 25th of March then last at a yearly rent of £125. The lease contained no covenant to build, but it did contain covenants to repair, maintain, support, amend, and keep all messuages or buildings erected or to be erected on any part of the said land, and to insure; and then in clause 10 it contained a declaration and agreement that the lessee should be at liberty at any time during the first twenty-one years of the said term to have a conveyance of any portion of the said freehold piece of land at the rate of £600 per acre, no purchase to be for a less aggregate sum than £1000, and the lessee might during the said twenty-one years purchase the said leasehold piece of land for £3000 for all the term, subject to a ground rent of £20 a year.

Now the first question is, what was that lease intended to be?

Was it intended to be a building lease or an ordinary lease? I have these indications: the recital that the trustees had power to grant building leases, the term being thirty-five years, which is longer than they had power to grant except in building leases, and the covenants concerning buildings to be erected upon the land, which are proper in a building lease and quite unusual in any other except a building lease. But there is an absence of any covenant to build. It has not been denied that it would not be good as a building lease. The internal evidence seems to me to be too strong for it to be doubted that it was not intended to be an ordinary lease, an agricultural lease, or any kind of lease other than a building lease. Then what took place afterwards was this. It seems that the lessee exercised his option of purchase as to the leasehold part only, and having exercised that option of purchase he sells his interest to another person. Thereupon a doubt appears to be raised as to whether this lease is a good lease. Accordingly a mode to remedy the defect in the lease is adopted which, to state it shortly, is this. Availing themselves of the Act 12 & 13 Vict. c. 26, they treat this lease as though it was not a building lease but a lease under the other power, and amend the defect of its being for thirty-five years instead of twenty-one, or rather the lessee intimates by a memorandum indorsed upon the lease that he is willing the lease shall be treated as a contract for a lease for twenty-one years. But still I must look at the Act and see whether it is possible in that way under the Act to turn what was intended to be a building lease into something else which is not a building lease. The Act merely says this: after reciting that leases are sometimes invalid by reason of the omission of some condition or restriction or by reason of a deviation from the terms of powers, the second clause, reading it shortly, enacts that where, in an intended exercise of any such power of leasing, a lease has been or shall be granted which is by reason of the non-observance or omission of some restriction, or by reason of any other deviation from the terms of such power, invalid, such lease, in case the same has been made *bonâ fide* and the lessee has entered, shall be considered in equity as a contract for the granting at the request of the lessee of a valid lease under such power to the like purport and effect as such

KAY, J.
1883
HALLETT TO MARTIN.

invalid lease, save so far as any variation may be necessary in order to comply with the terms of such power. But that obviously means that where under a power reserved to grant a building lease a building lease has been granted in which there is some defect which can in this way be cured, the Act will cure that defect and make it a good building lease. But how is it possible to cure the defect in this building lease and make it a good building lease? Is the defect in this lease, as a building lease, such a one as the Act contemplates? There is the absolute omission of any covenant to build. How could I know what sort of covenant to build I should insert here? How is it possible under that Act to cure a building lease in that respect. It has not been attempted to say that it could be so done; and the course the parties have taken is one which shews that they were plainly of opinion that it could not be cured as a building lease. Then how is it possible under this Act of Parliament to say, "Very well, then, seeing that this which was intended as a building lease cannot be made a building lease under this Act, we will turn it into a different class of lease which it was not intended to be, and make it good?" That, to my mind, is a perversion of the intent and meaning of the Act of Parliament. But even then the difficulty is not got over altogether, because supposing it were possible to apply the Act of Parliament for that purpose, there is still a defect in this lease as a lease under the other power which there is no power of curing under the Act at all, and that is this, that the rent for the freehold portion of this land is a rent which is not the best rent that could be obtained, but is a rent which is to increase every seven years, which would be perfectly good under the power to grant building leases, but entirely bad under the power to grant other leases; and, as to that, is it possible for the Court under this Act of Parliament to say what sort of rent shall be substituted for this increasing rent? It is not. Therefore that is again a defect, which if you treat this lease as being a lease not under the power to grant building leases but under the other power, is one which under this Act of Parliament cannot be remedied. I must say I think this lease in any view of the case is bad and invalid, as departing, not in a mere formal manner, from the terms of the power but departing

from them in essential respects. Then the power of granting leases contained the power to grant in a lease the option of purchase. But there was no power to grant an option of purchase otherwise or in any other way than in a valid lease under the power, and therefore I am sorry to say that the option to purchase must fall with the lease. If the lease be invalid because it departs from the power, as I think it does, in respects which the Court has no power to remedy under the Act 12 & 13 Vict., the option of purchase which could only be conferred as part of a valid lease must fall with the rest of it. Accordingly I think the objection must prevail. I am very sorry for it, and I have looked into the matter most anxiously to see whether there was any mode in which the Court could assist the parties to maintain the contract. I think there is none, and I think for that reason the objection must prevail, and the summons will therefore be dismissed with costs.

Solicitors: *Clarke & Calkin*, agents for *Clarke & Howlett, Brighton; Nash & Field*, agents for *Stuckey, Son, & Jennings, Brighton.*

W. W. K.

MILES *v.* JARVIS.

[1882 M. 656.]

Will—Gift for Life—Gift to Children living at the time of the Decease of Tenant for Life or thereafter to be born—Contingent Remainder or Executory Devise.

Testator gave an estate to his wife *Elizabeth* and her assigns for her life, and after her decease unto all and every the lawful children of his son *William* living at the time of the decease of his wife *Elizabeth* or thereafter to be born, in equal shares as tenants in common:

Held, that this was an executory devise, and that the children born after the death of the tenant for life were entitled to share equally with those born before her death.

Brackenbury v. *Gibbons* (1) and *In re Lechmere and Lloyd* (2) observed upon.

RICHARD JARVIS, who died in April, 1860, by his will, made in December, 1858, after appointing his wife *Elizabeth* sole executrix and making a bequest in her favour, devised unto his

(1) 2 Ch. D. 417. (2) 18 Ch. D. 524.

KAY, J. 1883 MILES v. JARVIS.

son, *William Jarvis*, an estate situate in *Loddon, Norfolk*, and other lands and hereditaments, absolutely.

By a codicil made in March, 1859, the testator revoked the devise in favour of his son, and devised the property to him and his assigns, for his life, and after his decease he devised the same unto all and every his son's lawful children then living or born in due time after his son's decease in equal shares as tenants in common, and their respective heirs and assigns; and by a second codicil made in June, 1859, the testator revoked the devise of the property to his son and his assigns for life, and thereby devised the property unto his wife *Elizabeth Jarvis* and her assigns for her life, and after her decease he devised the same unto all and every the lawful children of his son *William Jarvis*, living at the time of the decease of his wife *Elizabeth*, or thereafter to be born, in equal shares as tenants in common, and their respective heirs and assigns.

The testator's widow, *Elizabeth Jarvis*, died in November, 1867, and at that time *William Jarvis* had six children, the eldest of whom attained the age of twenty-one years in November, 1878.

The mother of the six children died in September, 1867.

William Jarvis married again in 1870, and of that marriage there were four children, at the time when this action was brought in February, 1882.

William Jarvis had been in possession of the estate.

The Plaintiffs were three of the children of *William Jarvis* by his first wife, and they asked that their father might be ordered to give up possession; for accounts; that the rights of all parties might be declared; for a sale, in lieu of partition of the property, and distribution of the proceeds; and for consequential relief.

Oswald, for the Plaintiffs:—

The question in this case is whether this gift is a contingent remainder or an executory devise, and I submit that upon the authority of the cases of *Holmes* v. *Prescott* (1), *Rhodes* v. *Whitehead* (2), *Perceval* v. *Perceval* (3), and *Brackenbury* v. *Gibbons* (4),

(1) 10 Jur. (N.S.) 507.
(2) 2 Dr. & Sm. 532.
(3) Law Rep. 9 Eq. 386.
(4) 2 Ch. D. 417.

this is, notwithstanding the words, "or thereafter to be born," and the case of *In re Lechmere and Lloyd* (1), a contingent remainder, and that the six children born before the death of the tenant for life are entitled to the estate to the exclusion of those who were born of the second marriage.

Langworthy, and *Langley*, for the Defendants *William Jarvis* and the other seven children, all infants, were not called upon.

KAY, J.:—

The devise here is "unto all and every the lawful children" of the son *William Jarvis* "living at the time of the decease of" the wife of the testator "or thereafter to be born" in equal shares. Now what is the meaning of these words? I think their meaning is plain. It is whether living at the death of the wife *Elizabeth Jarvis*, or thereafter to be born; and the words do not mean an alternative gift to the children living at the death of the wife or those born afterwards. That is made abundantly clear by the use of the words "all and every" at the beginning of the devise. I am therefore of opinion that the gift includes both the children living at the death of the tenant for life, and all those thereafter born. Is that a contingent remainder, or an executory devise? If it be a contingent remainder there will be a difficulty in letting in the children "thereafter to be born" to take shares; they would be excluded from participating. But would that be a true construction of the codicil? In *Brackenbury* v. *Gibbons* (2) the limitation was very similar, and that mode of construction was adopted by Vice-Chancellor *Hall*, who after referring to *Holmes* v. *Prescott* (3) and *Rhodes* v. *Whitehead*, said (4), "It must be considered that the law is settled as to a gift of this kind; and every gift which can take effect as a remainder absolutely excludes its being treated as an executory devise" and he held that those children who attained twenty-one before the death of the tenant for life took vested interests to the exclusion of those children who attained that age subsequently. A similar case came before the late Master of the Rolls. I refer to *In re Lechmere and Lloyd*, where

(1) 18 Ch. D. 524.
(2) 2 Ch. D. 417.
(3) 10 Jur. (N.S.) 507.
(4) 2 Ch. D. 419.

KAY, J. 1883 MILES v. JARVIS.

the gift was to a granddaughter for life, and after her decease to her children living at her death, and the issue of her children then deceased as should either before or after her decease attain twenty-one, if males, or twenty-one or marry, if females, and the Master of the Rolls declined to follow the decision of Vice-Chancellor *Hall*, and adopted the construction that it was not a contingent remainder, but an executory devise, and thus he let in to take shares the members of the class who might attain twenty-one, if males, or twenty-one or be married, if females, after the death of the tenant for life. The question is which of these two decisions I should follow, and it seems to me that I ought to follow that of the Master of the Rolls as being the better in point of law. The words of gift here are "living at the time of the decease" of the wife "or thereafter to be born," and in my opinion the class could not take by way of contingent remainder; those who are "thereafter to be born" must take if at all by way of executory devise. Therefore it seems to me that this is a case which does not come within the rule of law that a gift which can take effect as a remainder shall not be construed to be an executory devise, but that on the contrary it is a gift which cannot take effect as a contingent remainder. Any other conclusion would defeat absolutely the words of the testator—the gift to the children "thereafter to be born." I hold, therefore, that this is an executory devise and not a contingent remainder, and there must be a declaration that the children of the testator's son, *William Jarvis*, whether born in the lifetime of the testator's widow or after her death, are entitled to share in the property.

Solicitors: *Storey & Cowland*, agents for *Sadd & Linay, Norwich; Whites, Renard & Co.*, agents for *Matthew Emerson, Norwich.*

T. F. M.

KAY, J.
1883
July 18, 23.

In re ANDROS.
ANDROS *v.* ANDROS.

[1882 A. 177.]

Will—Bequest—"Great Nephews, the Sons of his deceased Nephew T. G. A."—Legitimacy—Domicil.

A bequest of personalty in an English will to the children of a foreigner must be construed to mean to his legitimate children, and by international law as recognised in this country those children are legitimate whose legitimacy is established by the law of their father's domicil.

Accordingly where a testator bequeathed personalty to his "great nephews the sons of his deceased nephew *T. G. A.*," and *T. G. A.* was domiciled in *Guernsey*:—

Held, that a son of *T. G. A.* born before wedlock, but legitimated according to the law of *Guernsey* by the subsequent marriage of *T. G. A.* with that son's mother, was entitled to share with the sons of *T. G. A.* born after the marriage in the testator's bequest:—

Observations on *In re Goodman's Trusts* (1) and *Boyes* v. *Bedale* (2).

SPECIAL CASE.

WILLIAM ANDROS, who died in January, 1882, by his will dated in August, 1879, gave (*inter alia*) one-third part of his personal estate to trustees "upon trust to pay and divide the same equally between such of his great nephews, the sons of his deceased nephew *Thomas Godfrey Andros*," as should survive him and attain the age of twenty-five years, in equal shares; but he gave his said trustees absolute discretion to pay to his said great nephews, or either of them, the whole or any portion of the capital of the shares or share to which they or he might be presumptively entitled at any time or times his said trustees might consider it expedient to do so.

Thomas Godfrey Andros was a native of *Guernsey*, and by the laws of that island a child born before the marriage of his parents becomes legitimate upon their subsequent marriage as fully as if he had been born in wedlock.

The Plaintiff was the son of *T. G. Andros*, and he was born in *Guernsey* in December, 1860. In January, 1865, *T. G. Andros* married in *Guernsey* the Plaintiff's mother, he had four children

(1) 17 Ch. D. 266. (2) 1 H. & M. 798.

KAY, J.
1883
In re ANDROS.
ANDROS *v.* ANDROS.

after the marriage, and he died domiciled in *Guernsey* on the 12th of November, 1875. The Plaintiff had attained twenty-one, and the trustees of the will being ready to pay him his due share of the one-third of the testator's residuary personal estate if they could lawfully do so, the question submitted for the opinion of the Court was whether the Plaintiff ought to be deemed to be a legitimate son of *Thomas Godfrey Andros*, and as such entitled to share with his children born after wedlock in the testator's bequest.

Hastings, Q.C., and *Bardswell*, for the Plaintiff:—

For the purpose of succession to personal estate a child is legitimate if he is legitimate according to the law of the country where his father is domiciled: *In re Goodman's Trusts* (1). It is true that was a case of intestacy, but there is no distinction in principle between it and the present case. The *status* of the Plaintiff then being that of a legitimate son of *T. G. Andros*, he is entitled to share in this bequest.

Hatfield Green, for the trustees and after-born children, cited *Boyes* v. *Bedale* (2).

1883. July 23. KAY, J.:—

This will being an English will must of course be construed according to English law. That law requires that all who take under a gift to sons of a named father should be legitimate offspring. It must now be treated as settled that any person legitimate according to the law of the domicil of his father at his birth is legitimate everywhere within the range of international law for the purpose of succeeding to personal property.

The well-known case of *Doe* v. *Vardill* (3), which introduced a distinction in this respect in the case of a person claiming to succeed as heir to real property in *England* by requiring such a person to establish his legitimacy according to English law—that is, as though the father had been domiciled in *England* at the time of the birth of the child—treats this as an exceptional case and recognises that the rule of succession to personal estate is

(1) 17 Ch. D. 266.
(2) 1 H. & M. 798.
(3) 7 Cl. & F. 895; 6 Bing. N. C. 385; 9 Bl. (N.S.) 32.

otherwise, and this has been recently more expressly decided by the Court of Appeal in *In re Goodman's Trusts* (1).

If, then, a child of a foreigner legitimate according to the law of his father's domicil, though illegitimate if his father had been a domiciled Englishman, can succeed as next of kin to personal estate in *England*, why should he not take a bequest of personalty by the description of the son of his father in the will of an English testator? On principle it seems to me very difficult to say why he should not.

However, in *Boyes* v. *Bedale* (2) the late Lord *Hatherley* in a considered judgment decided that such a person could not take under a gift to the children of his father. The will and every term in it, his Lordship held, must be construed according to English law. If in a Canadian will there were a gift of £100, that would mean £100 Canadian currency not £100 sterling. So the testator "must be taken to mean a child in the sense in which the law of *England* understands the term."

Speaking with all deference the illustration seems to me inapt and wanting in analogy. If two countries happen to have the same name for their monetary currency no one for a moment could suppose that a testator in one of these using the familiar name of the currency of his own country meant by that the currency of different value of the foreign country which happened to have the same name; but how does it follow from this that a gift to the children of a foreigner means such children only as would be legitimate if he had been a domiciled Englishman. A bequest in an English will to the children of *A.* means to his legitimate children, but the rule of construction goes no further. The question remains who are his legitimate children. That certainly is not a question of construction of the will. It is a question of *status*. By what law is that *status* to be determined. That is a question of law. Does that comity of nations which we call international law apply to the case or not? That may be a matter for consideration, but I do not see how the construction of the will has anything to do with it. The matter may be put in another way. What did the testator intend by this gift? That is answered by the rule of construction. He intended *A.*'s legitimate children.

(1) 17 Ch. D. 266. (2) 1 H. & M. 798.

KAY, J.
1883
In re ANDROS.
ANDROS *v.* ANDROS.

If you ask the further question, Did he intend his children who would be legitimate according to English law or his actual legitimate children? How can the rule of construction answer that?

Lord *Hatherley* considered that the bequest must be read to such children as would be legitimate according to the law of *England* if their father had been a domiciled Englishman at their birth. But is that according to the English rule of construction that children means legitimate children? Try it thus. Suppose the same rule of construction to prevail in *Guernsey*, and that in the will of a *Guernsey* testator there were a bequest to the children of an Englishman. According to *Boyes* v. *Bedale* (1) children would mean such children as would be legitimate according to the law of *Guernsey*. By this construction *ante nati* of the English father would share with his children legitimate according to English law, because they would have been legitimate if the father had been domiciled in *Guernsey*, though they were in fact illegitimate by English and, of course, by international law.

This would not carry out, but contravene, the rule of construction.

Vice-Chancellor *Kindersley*, in *In re Wilson's Trusts* (2), expressed his readiness to follow *Boyes* v. *Bedale*. The facts of that case, however, were not the same. A domiciled Englishman had married an English woman. He went to *Scotland*, and without having a Scotch domicil he sued for and obtained a Scotch divorce, which was not sufficient to dissolve the English marriage. The woman then married in *Scotland* a domiciled Scotchman, and had children by him, and the question was whether they could be considered legitimate in *England*. The decision of Vice-Chancellor *Kindersley* was supported in the House of Lords (*Shaw* v. *Gould* (3)) on the ground that international law did not require the English Courts to recognise such a divorce, and therefore the children were not by that law legitimate.

That decision does not apply, because it cannot be denied that the children in this case would be recognised as legitimate, for some purposes at any rate, by every other State in Christendom.

These are the two cases most nearly in point on the one side.

(1) 1 H. & M. 798. (2) Law Rep. 1 Eq. 247.
(3) Law Rep. 3 H. L. 55.

On the other there are two decisions of Vice-Chancellor *Stuart*, *Goodman* v. *Goodman* (1) and *Skottowe* v. *Young* (2). The late Master of the Rolls observes of the former that the point was not there really considered and decided: see *In re Goodman's Trusts* (3). But according to the report it certainly was argued, and the decision was that *ante nati* born in *England* while the father was domiciled here could not take under a gift to children, but that an *ante natus* born in *Holland* when the father was domiciled there might take in conjunction with the *post nati* by the same mother whom he married in that country, thus legitimising the *ante natus* there. *Skottowe* v. *Young* was a question of legacy duty, but the same point was involved.

Besides these two cases there is the analogy which I have referred to derivable from the decisions, shewing that a child legitimate by the law of his father's domicil may take as next of kin in a succession to personal estate in *England*.

But in addition to these considerations there is the opinion of Lords Justices *Cotton* and *James* in the case of *In re Goodman's Trusts* (4). The former says (5):—

"In *Boyes* v. *Bedale* (6) the question was on the construction of a bequest in the will of a domiciled Englishman to the children of a person named. The Vice-Chancellor held that a child exactly in the same position as *Hannah Pieret* was not entitled under the bequest. He said that the will, being that of a domiciled Englishman, must be construed according to English law, which, in my opinion, is correct so far as to require that this word 'children' shall be construed 'legitimate children.' But he held that English law recognised as legitimate only those children born in wedlock. This, though correct as regards the children of persons domiciled in *England* at the time of their birth, is, in my opinion, erroneous as to children born of parents who at the time of the birth were domiciled in a country by the law of which the children were legitimate."

Lord Justice *James* says (7) "the decision in *Boyes* v. *Bedale*

(1) 3 Giff. 643.
(2) Law Rep. 11 Eq. 474.
(3) 14 Ch. D. 619.
(4) 17 Ch. D. 266.
(5) Ibid. 295.
(6) 1 H. & M. 798.
(7) 17 Ch. D. 299.

KAY, J.
1883
In re ANDROS.
ANDROS *v.* ANDROS.

was on the ground that, in an Englishman's will, the children of a nephew must mean children who would be lawful children if they were English children. That seems to me a violent presumption. It was an accident in that case that the testator was an Englishman. But supposing it had been the will of a Frenchman, dying domiciled in *England*, and made in favour of his French relations and their children, or of his own children, there being children legitimate and legitimated, what would have been said of such a presumption and such a construction ?"

The decision in *In re Goodman's Trusts* (1) overruled the late Master of the Rolls, and was dissented from by Lord Justice *Lush*.

This conflict of authority leaves me free to decide this case according to my own opinion, which is in favour of the Plaintiff's claim.

I observe that the testator describes the objects of his bounty not merely as the sons of his deceased nephew *Thomas Godfrey Andros*, but also as his own great nephews; but that, in my opinion, makes no difference. The law of this country by the comity of nations recognises the Plaintiff as legitimate, and therefore he is as much the lawful nephew of the testator as he is the lawful son of *J. G. Andros*.

The law, as I understand it, is that a bequest of personalty in an English will to the children of a foreigner means to his legitimate children, and that by international law, as recognised in this country, those children are legitimate whose legitimacy is established by the law of the father's domicil. Thus *ante nati* whose father was domiciled in *Guernsey* at their birth, and subsequently married the mother so as to make the *ante nati* legitimate by the law of *Guernsey*, are recognised as legitimate by the law of this country, and can take under such a gift.

Solicitors: *Burton, Yeates, Hart, & Burton.*

(1) 17 Ch. D. 266.

W. W. K.

In re EARL OF CHESTERFIELD'S TRUSTS.

CHITTY, J.

1883

June 23.

Will—Residuary Gift—Trust for Conversion—Power to postpone—Tenant for Life and Remainderman—Expectancy—Property falling in after Testator's Death—Apportionment between Capital and Income, how made—Compound Interest—Yearly Rests.

Where a testator has bequeathed his residuary personal estate to trustees upon trust for conversion, with power to postpone such conversion at their discretion, and to hold the proceeds upon trust for a person for life with remainders over, and such residue includes outstanding personal estate, the conversion of which the trustees, in the exercise of their discretion, postpone for the benefit of the estate, and which eventually falls in some years after the testator's death—as for instance a mortgage debt with arrears of interest, or arrears of an annuity with interest, or moneys payable on a life policy—such outstanding personal estate should, on falling in, be apportioned as between capital and income by ascertaining the sum which, put out at interest at 4 per cent. per annum on the day of the testator's death, and accumulating at compound interest calculated at that rate with yearly rests and deducting income tax, would, with the accumulations of interest, have produced, at the day of receipt, the amount actually received; and the sum so ascertained should be treated as capital, and the residue as income.

Beavan v. *Beavan* (1) followed.

PETITION.

By an indenture dated the 18th of March, 1850, and made between Colonel *Tynte* of the one part, and *George*, sixth Earl of *Chesterfield*, of the other part, Colonel *Tynte* covenanted with the Earl that in case he, the Colonel, should be living at the death of his father, *C. K. K. Tynte*, he, the Colonel, would, within six calendar months after the death of his said father, pay to the Earl, his executors, administrators, or assigns, the sum of £18,310 with interest for the same at the rate of £5 per cent. per annum from the day of such death until payment of the principal sum; and further that he, the Colonel, would, during the joint lives of himself and his said father, and in case he should survive his said father, until payment of the said principal sum, and the interest thereof, upon the request and at the expense of the Earl, his executors, administrators, or assigns, do all acts for enabling him or them to effect and keep on foot any assurance or assurances on

(1) *Post*, p. 649.

CHITTY, J. 1883 *In re* EARL OF CHESTERFIELD'S TRUSTS.

his, the Colonel's, life to the extent of £18,310; and the Colonel conveyed his life interest in remainder expectant on the death of his said father in the *Tynte* family estates (subject to certain prior incumbrances) to the Earl by way of mortgage for securing the repayment of the £18,310 and interest.

In pursuance of that deed, and shortly after its execution, the Earl effected two policies of insurance for £5000 each on Colonel *Tynte's* life, and these policies were thenceforward kept up and the premiums thereon paid by the Earl during his life. Colonel *Tynte's* father died on the 22nd of November, 1860, and shortly afterwards a suit of *Ford* v. *Tynte* and other suits were instituted against Colonel *Tynte* for the purpose of ascertaining the priority of the incumbrances upon his life interest in the *Tynte* family estates, and of obtaining payment of such incumbrances. The priority of the incumbrances having been ascertained, they were paid off in succession out of the income of the estates, but those having priority over the Earl's security were numerous, and it was not until the year 1878, as hereinafter mentioned, that any part of the moneys due on that security were paid.

The Earl died on the 1st of June, 1866, having by his will given all his property to his son the seventh Earl of *Chesterfield*, absolutely, and appointed him sole executor.

The seventh Earl, by his will dated the 6th of May, 1871, after certain specific bequests and legacies, devised and bequeathed unto and to the use of the Honourable *Edward Chandos Leigh* and Earl *Howe* his real and residuary personal estate upon trust that his said trustees or trustee should at such times or time after his decease as they or he should in their or his absolute discretion think fit, and with power to postpone such conversion at such discretion, get in, receive, and convert into money so much of his personal estate as should not consist of money, and out of the money arising thereby should pay his debts and funeral and testamentary expenses and legacies, and in the next place should pay all the debts of his late father then remaining unpaid, and after such payments should lay out the surplus of such personal estate in the purchase of lands and hereditaments in *England* or *Wales* to be settled upon the uses thereinafter declared of his real estate, or as near thereto as circumstances would permit. And

the will went on to declare limitations of the testator's real estate in strict settlement in favour of his sister *Evelyn*, Countess of *Carnarvon*, her only son Lord *Porchester*, and his issue. And the testator appointed the said *Edward Chandos Leigh* and Earl *Howe* executors and trustees of his said will.

The testator, the seventh Earl, died on the 1st of December, 1871.

Shortly after the death of the seventh Earl, his trustees got in and converted his personal estate not specifically bequeathed (except the debt due from Colonel *Tynte* and the policies on his life) and exhausted the proceeds in payment of his funeral and testamentary expenses and of some of his debts and legacies.

Under an indenture dated the 6th of August, 1874 (being a re-settlement of the *Chesterfield* family estates), all the hereditaments subject to the will of the seventh Earl, whether originally devised or directed to be purchased with his residuary personal estate and to be conveyed to the uses of the will, and also his residuary personal estate until invested in land as by the said will directed, became limited to the use of the said Countess of *Carnarvon* during her life, with remainder (subject to a rent-charge thereby limited in favour of Lord *Porchester* on his attaining twenty-one), to the use of her husband the Earl of *Carnarvon* during his life, with remainder to the use of Lord *Porchester* during his life, with remainder to his first and other sons in tail male, with remainders over.

The Countess of *Carnarvon* died on the 25th of January, 1875, having by her will appointed the Earl of *Carnarvon* her executor. She had no other son but Lord *Porchester*, who was at present an infant.

From the death of the sixth Earl of *Chesterfield* the two policies on Colonel *Tynte's* life were kept up by the seventh Earl during his life, after his death by the Countess of *Carnarvon* during her life, and after her death by the Earl of *Carnarvon* down to the end of 1878.

In the year 1878 the time at length arrived for payment out of the income of the *Tynte* family estates of the debt of £18,310 and interest due from Colonel *Tynte*, and the trustees of the will of the seventh Earl from time to time in the course of the years

CHITTY, J. 1883 *In re* EARL OF CHESTERFIELD'S TRUSTS.

1878, 1879, 1880, and 1881, accordingly received in respect of the said debt and interest sums of money amounting together to £36,641 5*s.* 4*d.* (hereinafter referred to as "the *Tynte* moneys"), of which £18,310 represented principal, and £18,331 5*s.* 4*d.* accumulations of interest from the death of Colonel *Tynte's* father.

On the 6th of March, 1879, the trustees of the will of the seventh Earl out of the *Tynte* moneys repaid to the Earl of *Carnarvon* the aggregate amount of the premiums paid by himself and the Countess on the policies, and thenceforward the trustees, out of the same moneys, paid the premiums on the policies down to Colonel *Tynte's* death.

Colonel *Tynte* died on the 16th of September, 1882, and thereupon the trustees duly received the sum of £10,000, the amount of the policies. They had also received at various times during Colonel *Tynte's* life sums amounting to £539 by way of bonuses on the policies. These two sums, amounting together to £10,539, are hereinafter referred to as "the policy moneys."

The trustees invested the *Tynte* and policy moneys, amounting together to £47,181 3*s.* 11*d.* in Exchequer bills, and from time to time as opportunities arose sold out portions of such Exchequer bills and applied the proceeds in payment of past and other premiums on the policies, and in discharge of certain charges and incumbrances on their testator's estate, the balance remaining in their hands being represented by £15,100 Exchequer bills, and £1428 10*s.* 1*d.* cash.

The question then arose whether this balance was distributable as between capital and income, and, if so, upon what principle. In considering this question the trustees were advised that the *Tynte* and policy moneys formed part of the residuary personal estate of the seventh Earl, and should be treated accordingly, and that they, the trustees, having in exercise of the power contained in the seventh Earl's will, postponed the conversion of the moneys for the benefit of the estate, should now, for the purpose of adjusting the equities between the persons successively entitled, ascertain how much thereof was attributable to capital and how much to income; and that the proper course in order to

arrive at such result was to take separately each amount received by the trustees (deducting in the case of the policy moneys the total accumulated premiums chargeable against the same) and to calculate what principal sum invested on the 1st of December, 1871 (the date of the death of the seventh Earl), at 4 per cent. interest, with yearly rests, would, at the date of the receipt, have produced the amount actually received; and that the aggregate of the principal sums arrived at by such calculation should be treated as capital and the residue as income, such income being further apportionable between the successive tenants for life.

The real estates subject to the seventh Earl's will were still subject to certain charges and incumbrances exceeding the balance of the *Tynte* and policy moneys; and in consequence of the falling in of the *Tynte* and policy moneys his estate was subject to some further liability for legacy duty, and the trustees had incurred some costs in recovering the *Tynte* moneys, and in administering the estates of the sixth and seventh Earls.

Under these circumstances the trustees presented this petition under *Lord St. Leonards' Act*, 1859 (22 & 23 Vict. c. 35), for the opinion of the Court upon the following questions: (1.) Whether the *Tynte* and policy moneys should be apportioned as between capital and income; (2.) Whether, if so, the principle above stated was the right principle for ascertaining how much of the *Tynte* and policy moneys respectively was attributable to capital and how much to income; or, if not, what was the right principle for ascertaining such result; (3.) Whether the trustees, out of the Exchequer bills and cash now in their hands representing the unapplied balance of the *Tynte* and policy moneys, might properly pay to the Earl of *Carnarvon*, in right of and as representative of the Countess of *Carnarvon*, such proportion of the amount so found to be attributable to income as should have accrued in respect of the time down to her death; (4.) Whether the trustees, out of the Exchequer bills and cash, might properly pay to the Earl of *Carnarvon* in his own right the balance of the amount so found to be attributable to income; and (5.) Whether the trustees should apply the ultimate residue of the Exchequer bills and cash, after such payments thereout as

CHITTY, J. 1883 *In re* EARL OF CHESTERFIELD'S TRUSTS.

aforesaid, in payment of such legacy duty and costs as above-mentioned, and then in or towards the further discharge of the incumbrances and charges affecting the estates subject to the seventh Earl's will; and (6.) In what manner the costs of this application should be paid or provided for.

Macnaghten, Q.C., and *Douglass Round*, for the Petitioners:—

We submit that it is settled, as a matter of principle, that in a case of this kind there ought to be an apportionment as between capital and income. The trustees and executors of the seventh Earl's will postponed the getting in and conversion of the *Tynte* and policy moneys, as they were entitled to do by the terms of the will; but the power to postpone conversion was a power not to be exercised for the benefit of the tenants for life as against the remaindermen, or for the benefit of the remaindermen as against the tenants for life, but for the benefit of the estate without disarranging the equities between the successive takers: *Wilkinson* v. *Duncan* (1). The only question is how the amounts respectively attributable to income and to capital are to be arrived at. We submit that the proper mode of calculation is as follows: each item of receipt should be taken separately, deducting in the case of the policy moneys the amounts repaid on account of the premiums; and as regards each item of receipt, it should be calculated what sum invested at the death of the seventh Earl at 4 per cent. interest, with yearly rests, would have produced the amount actually received: then the aggregate of the principal sums arrived at by this calculation ought to be treated as capital, and the rest ought to be treated as income and, as such, payable to the Earl of *Carnarvon*, partly in his own right and partly in right of his deceased wife. It seems the proper course to allow the tenant for life compound interest, and not merely simple interest, though this point does not appear to have been discussed in the reported cases, it having been apparently assumed that simple interest only could be allowed: *Wilkinson* v. *Duncan*; *Cox* v. *Cox* (2); *Wright* v. *Lambert* (3); and it is so laid down in *Jarman* on Wills (4). But in an unreported

(1) 23 Beav. 469.
(2) Law Rep. 8 Eq. 343.
(3) 6 Ch. D. 649.
(4) 4th Ed. p. 609.

case of *Beavan* v. *Beavan* (1), decided by Lord *Romilly*, M.R., in 1869, before *Cox* v. *Cox* (2) and *Wright* v. *Lambert* (3), this

(1) M.R., Feb. 22, 1869.

BEAVAN *v.* BEAVAN.

[B. 1853 18.]

ADJOURNED SUMMONS.

The action was for the administration of the estate of a testator, *Henry William Beavan*, deceased, and a decree for that purpose was made on the 5th of March, 1853.

By his will, dated the 8th of March, 1849, after directing payment of his debts and funeral and testamentary expenses, and devising certain real estate, the testator bequeathed his money at his bankers, his furniture, plate, &c., to his wife, the Defendant, *Joanna Beavan*, absolutely. And he devised and bequeathed the residue of his real and personal estate to his said wife and *Thomas Paterson Anderson* (since deceased), upon trust that his said trustees or trustee should sell his real estate at such times and in such manner as they, he, or she should in their, his, or her uncontrolled discretion think most advantageous to his estate, and should with all convenient speed after his decease, and in such manner as they, he, or she should in their, his, or her discretion think most beneficial, sell, call in, and convert into money all the said residuary personal estate (except such part thereof as should consist of ready money), and should, out of the moneys which should come to their hands by virtue of the said residuary devise or bequest and the trusts, pay his debts and funeral and testamentary expenses and legacies, and subject thereto should invest the same residuary moneys in Government or real securities in *England* or *Wales*, and should pay the income of the said residuary real and personal estates and trust funds and premises to his said wife during her life or widowhood; and after her decease or second marriage should hold the said trust premises in trust for his children who should attain twenty-one or marry as therein mentioned. And the testator appointed his said wife sole executrix of his will.

The testator died on the 23rd of June, 1852, leaving surviving him his widow, the Defendant, *Joanna Beavan*, and five children, the Plaintiffs, all of whom except one had attained twenty-one.

Part of the testator's personal estate consisted of a moiety of an annuity of £675 granted by Colonel *Tynte* (named in the principal case) on the 10th of March, 1847, for ninety-nine years if three persons, who were now still living, or any of them, should so long live.

This annuity was secured principally upon certain estates and trust moneys to which Colonel *Tynte* was entitled for life in remainder expectant on the several deceases of his father and other persons, subject to incumbrances, and was payable quarterly, with interest at five per cent. per annum on any quarterly payment remaining unpaid. The entire annuity was redeemable at any time on payment of £4668 15*s.*, and arrears (if any) of interest and costs.

Nothing whatever was paid to the testator during his life, nor to his executrix, in respect of the annuity from the time it was granted down to the 8th of August, 1865, there being in fact no income of the estates charged with the annuity until after the death

(2) Law Rep. 8 Eq. 343.

(3) 6 Ch. D. 649.

CHITTY, J. 1883 *In re* EARL OF CHESTERFIELD'S TRUSTS.

very question was argued, and it was held that compound interest should be allowed.

[CHITTY, J.:—I do not see on what ground the remainderman,

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of Colonel *Tynte's* father, and the Colonel himself being personally unable to pay it.

The testator also died possessed of a mortgage dated the 31st of March, 1848, whereby Colonel *Tynte* mortgaged the above-mentioned estates to him as security for the repayment of the sum of £3000 and other principal sums therein mentioned, with interest at 5 per cent. per annum.

By the Chief Clerk's certificate, dated the 23rd of February, 1858, it was certified that, having regard to the nature of the mortgage of the 31st of March, 1848, and the testator's moiety of the said annuity, which securities were certified as part of the testator's estate outstanding or undisposed of, it was fit and proper and for the benefit of all parties interested under the will that the same should not be sold but allowed to remain in their then present state during the life of the Colonel's father, the tenant for life of the greater part of the estates comprised in the securities, and who was then eighty-two years of age, or until further order.

Colonel *Tynte's* father died on the 22nd of November, 1860, whereupon the Colonel's life interest in two estates fell into possession, and his life interest in the remaining estate and trust moneys fell into possession at a later period.

At the death of Colonel *Tynte's* father certain suits relating to the family estates were pending, and shortly afterwards a suit of *Ford* v. *Tynte* and other suits were instituted also relating to those estates.

In 1865 orders were made in these suits for payment of all arrears of the said annuity and interest on such arrears and for keeping down the same.

The total sum received for arrears and interest of the testator's moiety of the annuity down to the 8th of August, 1865, was £8656 10*s.* 7*d.*, of which £1949 15*s.* 3*d.* represented arrears and interest due at his death.

For the same reasons as those which delayed the payment of the annuity no payment was made in respect of the mortgage of 1848 until the year 1866, and ultimately the balance of the whole principal money and interest was paid off in 1868. The sums received by the Defendant *Joanna Beavan* as executrix of the testator under orders in *Ford* v. *Tynte* and the other suits on account of the sum of £3000, part of the sums secured by the mortgage of 1848, amounted in five payments made during the years 1866, 1867, and 1868, to £5950 17*s.* 6*d.*, consisting of £3000 for principal money and £616 0*s.* 3*d.* for arrears of interest thereon due at the testator's death, and of £2334 17*s.* 3*d.* for interest at five per cent. accrued subsequent to his death.

The two sums of £8656 10*s.* 7*d.* and £5950 17*s.* 6*d.* having been received by the testator's estate as above mentioned, the question arose upon what principle they ought to be apportioned as between the tenant for life and the remaindermen under the will. In order to have this question decided the Defendant *Joanna Beavan* on the 23rd of December, 1868, took out a summons to determine (amongst other things), "First, the principle on which the said sum of £8656 10*s.* 7*d.* received

rather than the tenant for life, should be entitled to what is in substance attributable to income.]

Beavan v. *Beavan* (1) certainly appears to adopt the more logical

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thirteen years after the testator's death, for arrears of the said annuity granted by Colonel *Tynte* to the testator, and interest, ought to be divided, the tenant for life of the residue of the testator's estate having received no payment for income on the fund during the above period; and secondly, to determine the principle on which the sum of £5950 17*s.* 6*d.* received in five payments during the years 1866, 1867, and 1868 for principal and interest in respect of Colonel *Tynte's* mortgage dated the 31st of March, 1848, ought to be divided as between the tenant for life and those in remainder."

The summons was adjourned into Court, and now came on for argument.

Jessel, Q.C., and *Archibald Smith*, for the Defendant, *Joanna Beavan*, the tenant for life, in support of summons:—

We submit first, that as to the testator's moiety of the annuity and the arrears thereof and the interest thereon—inasmuch as that moiety ought or might, according to the direction in the will, have been sold and realised immediately after the testator's death, but for the common advantage of all parties was retained unsold and outstanding—the proper mode of apportionment is as follows: a sum of £100 accumulating at compound interest from the testator's death in 1852 at 4 per cent. per annum payable half yearly would in thirteen years ending in 1865, when the fund was received, amount to £167 6*s.* 10*d.* Dividing the £8656 10*s.* 7*d.* in the proportion of £100 to £67 6*s.* 10*d.*, the result is that that sum recovered at the end of thirteen years ought to be considered as consisting of £5172 19*s.* for capital and £3483 11*s.* 7*d.* for income. Then if income tax at the rate of 10*d.* in pound (being the average rate between the years 1852 and 1865) be deducted so that interest is calculated at the rate of £3 16*s.* 8*d.* per cent. the result will be £5261 13*s.* for capital and £3394 17*s.* 7*d.* for income. Any subsequent instalments of the annuity becoming due either in the lifetime of the tenant for life or after her death ought to be apportioned on the same principle.

The principle of apportioning, as between capital and income, property falling into a testator's estate subsequently to his death has already been settled by your Lordship in *Wilkinson* v. *Duncan* (23 Beav. 469); and as the postponement of the getting in and conversion of the several funds was for the interest of both tenant for life and remainderman, the capital sum ascertained upon the above principle in respect of each fund as at the death of the testator should carry interest from the death at the rate of 4 per cent.: *Gibson* v. *Bott* (7 Ves. 89). We also submit that in applying the principle of apportionment as between capital and income, compound interest, and not simple interest should be calculated, so that the tenant for life may receive the full income value.

Secondly, we submit that as regards the £5950 17*s.* 6*d.*, the £3616 0*s.* 3*d.*

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(1) *Ante*, p. 649.

CHITTY, J. 1883 *In re* EARL OF CHESTERFIELD'S TRUSTS.

principle. It seems also right that the calculation should be made as from the testator's death, and not from the expiration of a year afterwards.

[CHITTY, J., referred to *In re Grabouski's Settlement* (1).]

due for principal and interest at the testator's death should be considered as capital, and the £2334 17*s.* 3*d.*, the balance thereof, should be treated, as in fact it is, as arrears of income and paid to the tenant for life.

Sir *R. Baggallay*, Q.C., and *Macnaghten*, for the Plaintiffs, the remaindermen:—

With regard to the testator's moiety of the annuity, we submit that out of the £8656 10*s.* 7*d.* the £1949 15*s.* 3*d.* due for arrears and interest at his death should in the first place have been made good to his estate and treated as capital: that out of the interest which actually accrued upon the arrears of annuity due at his death interest on that £1949 15*s.* 3*d.* at 4 per cent. per annum calculated from the day of death to the 8th of August, 1865, when the arrears and interest were received, should then have been paid to the tenant for life; that in the next place a value should have been set upon the moiety of annuity as on the 23rd of June, 1853, the expiration of one year from the death, and that out of the residue of the £8656 10*s.* 7*d.*, after deducting the £1949 15*s.* 3*d.* and the interest thereon, interest at 4 per cent. per annum upon the estimated value of the moiety of annuity should have been paid to the tenant for life in respect of the period between the testator's death and the 8th of August, 1865; and then that the balance of the £8656 10*s.* 7*d.* and all further payments in respect of the moiety of annuity as they accrued due or may accrue due should have been and should be treated as capital and invested accordingly, the tenant for life receiving the interest upon such investment. The account should therefore be adjusted upon this footing.

As regards the £5950 17*s.* 6*d.*, we submit that, as the mortgage in respect of which it was received was not, strictly speaking, a security authorized by the will, the tenant for life is only entitled to interest at 4 per cent. from the testator's death until the mortgage was paid off, and that the surplus interest should be treated as capital and invested accordingly. Simple interest only should be allowed in adjusting the accounts of the above-mentioned funds, particularly in the case of the annuity. *Wilkinson* v. *Duncan* (23 Beav. 469) is not directly in point, for there the annuity had fallen in, whereas in the present case it is still subsisting.

LORD ROMILLY, M.R., held that the £8656 10*s.* 7*d.* and the £5950 17*s.* 6*d.* ought to be apportioned on the principle laid down in *Wilkinson* v. *Duncan*, but that in making such apportionment the several amounts should be calculated at compound and not simple interest.

The order was, so far as is material, drawn up in the following form (Entry Book of Decrees and Orders (Chancery), 1869, A. fol. 462):—

"On the application of the Defen-

(1) Law Rep. 6 Eq. 12.

Romer, Q.C., and *Bromehead*, for the Respondents, the Earl of *Carnarvon* and Lord *Porchester*:—

We think *Beavan* v. *Beavan* (1) lays down the more correct principle for calculating an apportionment in such a case as this.

CHITTY, J.:—

It appears to me that *Beavan* v. *Beavan* adopts the right principle, and I therefore follow it in the present case.

The order stating the opinion of the Court was, so far as is material, in the following form:—

"Upon the petition &c., this Court is of opinion that the said *Tynte* moneys are apportionable between principal and income by ascertaining the respective sums which, put out at £4 per cent. per annum on the 1st of December, 1871,

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dant, *Joanna Beavan*, &c., his Lordship is of opinion

"1. That the £8656 10*s.* 7*d.*, received by the Defendant *Joanna Beavan* on the 8th of August, 1865, in respect of the arrears of the testator's moiety of the annuity of £675 and interest, ought to be apportioned as on that day between corpus and income by ascertaining the sum which, put out at interest at 4 per cent. per annum on the 23rd of June, 1852, the day of the death of *Henry William Beavan*, the testator in this cause, and accumulating at compound interest calculated at that rate with yearly rests, and deducting income tax, would, with the accumulations of interest, amount on the 8th of August, 1865, to £8656 10*s.* 7*d.*, and that the sum so ascertained ought to be treated as corpus as on that day, and the difference between £8656 10*s.* 7*d.* and the sum so ascertained ought to be treated as income payable on that day to the Defendant *Joanna Beavan* as tenant for life.

"2. That each of the instalments of the said moiety of the annuity of £675, with or without interest, received after the 8th of August, 1865, or to be hereafter received, ought to be apportioned between corpus and income as on the day on which such instalment was or shall be received, on the same principle on which the £8656 10*s.* 7*d.* received on the 8th of August, 1865, is hereinbefore directed to be apportioned.

"3. That each of the several sums making up the sum of £5950 17*s.* 6*d.* received by the Defendant *Joanna Beavan* on account of principal and interest on the sum of £3000, part of the sum secured by the mortgage of the 31st of March, 1848, irrespective of premiums, ought to be apportioned between corpus and income as on the day on which each such sum was received, on the same principle on which the said £8656 10*s.* 7*d.* is to be apportioned as aforesaid."

Solicitors: *C. J. & H. Shoubridge.*

(1) *Ante*, p. 649.

CHITTY, J.
1883
In re EARL OF CHESTERFIELD'S TRUSTS.

the day of the death of the seventh Earl of *Chesterfield*, and accumulating at compound interest calculated at that rate with yearly rests, and deducting income tax, would, with the accumulations of interest, have produced, at the respective dates of receipt, the amounts actually received; and that the aggregate of the sums so ascertained ought to be treated as principal and be applied accordingly, and the residue should be treated as income: And that the amount apportioned in respect of income is payable to the Earl of *Carnarvon* in his own right, and as representing his late wife, *Evelyn*, Countess of *Carnarvon*, deceased: And that the policy moneys, including bonuses, after deducting and repaying the sums advanced for premiums with simple interest at 4 per cent., are apportionable and distributable in the same way: And this Court is also of opinion that the legacy and other duty is payable out of capital and income according to their respective liability thereto: And that the costs of the Petitioners and Respondents of this petition ought to be apportioned between capital and income according to their respective amounts."

Solicitors: *Frere, Forster, & Co.; Bowlings, Foyer, & Hordern.*

G. I. F. C.

CHITTY, J.
1883
July 9, 16.

In re ILLIDGE.
DAVIDSON *v.* ILLIDGE.

[1876 I. 94.]

*Administration—Real Estate—Assets—Heir-at-Law—Devisee—Specialty Debt—Simple Contract Debt—Retainer—*3 *&* 4 *Will.* 4, *c.* 104 [*Revised Ed. Statutes, vol. vii. p.* 617]*—Hinde Palmer's Act* (32 *&* 33 *Vict. c.* 46).

An heir-at-law or devisee of real estate sold by the Court under 3 & 4 Will. 4, c. 104, has no right of retainer, either out of the proceeds of sale or any rents in his hands, for a debt due to him either on simple contract or, having regard to *Hinde Palmer's Act* (32 & 33 Vict. c. 46), on specialty.

Observations on *Ferguson* v. *Gibson* (1).

FURTHER CONSIDERATION.

Thomas Bailey Illidge, by his will, dated in 1853, gave and bequeathed all his real and personal estate to his mother, the Defendant *Mary Ann Illidge*, and appointed her his executrix. He died on the 29th of December, 1875, a bachelor, leaving his brother, the Defendant, *John Betts Illidge*, his heir-at-law, and his will was duly proved by the Defendant *Mary Ann Illidge*.

By a deed-poll of the 26th of June, 1876, the Defendant *Mary*

(1) Law Rep. 14 Eq. 379.

Ann Illidge disclaimed the devise of the real estate contained in her son's will, whereupon the real estate devolved on the Defendant *John Betts Illidge*, as his heir-at-law.

The Plaintiffs were unpaid judgment creditors of the testator, and, on behalf of themselves and his other creditors, brought this action against his executrix and heir-at-law for the administration of his real and personal estate, and a judgment for that purpose was given on the 13th of January, 1877, the real estate being ordered to be sold.

The Defendant *Mary Ann Illidge* subsequently died, whereupon administration *de bonis non* to the estate of the testator was granted to his heir-at law, the Defendant *John Betts Illidge*.

Under the administration judgment the whole of the testator's real estate, which was of large amount but subject to numerous incumbrances, was sold and the proceeds were paid into Court to the credit of the action.

In the course of the inquiries taken under the judgment it appeared that the Defendant, *John Betts Illidge*, had from time to time during the lifetime of the testator paid out of his own moneys various sums on the testator's behalf by way of income to the parties interested under certain marriage settlements, and he accordingly came in and proved, and now claimed to stand as a simple contract creditor against the testator's estate for, the sums so paid, with interest. A considerable balance was found due from the Defendant, *John Betts Illidge*, for rents received by him as the testator's heir-at-law, and this balance he claimed to retain against the testator's general indebtedness to him.

The action now coming on upon further consideration, various questions arose, but the only question calling for a report was whether the Defendant, *John Betts Illidge*, had, as heir-at-law, a right of retainer in respect of his simple contract debt out of the proceeds of the real estate sold or out of the rents in his hands.

Romer, Q.C., and *E. Cutler*, for the Defendant *John Betts Illidge*:—

The real estate has been sold pursuant to the Act 3 & 4 Will. 4, c. 104, which makes the real estate of a deceased person assets for payment of his debts, and we submit that the Defendant,

CHITTY, J. 1883 *In re* ILLIDGE. DAVIDSON *v.* ILLIDGE.

as heir-at-law of the testator, has a right of retainer for his debt out of the proceeds. There is no direct authority upon the point, but it would seem upon principle that an heir-at-law stands in this respect on the same footing as a trustee or devisee. In *Hall* v. *Macdonald* (1) it was held that a trustee of real estates sold for payment of the testator's debts is entitled to retain a debt due to him from the testator out of the proceeds, and that his right is not prejudiced by the proceeds being paid into Court. In *Player* v. *Foxhall* (2) the heir's right of retainer seems to have been recognised, though he was held in that case to have lost his right by express waiver. In *Ferguson* v. *Gibson* (3) Vice-Chancellor *Wickens* held that a devisee had a right of retainer both as against the proceeds of the testator's realty and as against his personalty. And in *Loomes* v. *Stotherd* (4) it was held that a devisee of real estate has a right of retainer by analogy to the right of an executor. The Act says that the heir shall be liable to creditors for the proceeds. Thus, as regards the proceeds of real estate, he is placed in the same position as an executor of personal estate, and should therefore, upon principle, possess the same right of retainer as an executor. He should, in fact, be treated as having under this Act the same right of retainer as under the Act 11 Geo. 4 & 1 Will. 4, c. 47, s. 6, an Act which makes the heir liable for his ancestor's debts to the extent of the value of the lands descended, although he may have sold them before action brought.

Crossley, Q.C., and *Northmore Lawrence*, for the Plaintiffs:—

We submit the heir has no right of retainer in this case. The Act 3 & 4 Will. 4, c. 104, is equivalent in its effect to a devise of real estate in trust for payment of debts; and in *Bain* v. *Sadler* (5) Vice-Chancellor *Wickens* expressly decided that "a trustee of an estate devised or conveyed to him for the purpose of paying debts has no right of retainer thereout, whether he is an executor or not." The Vice-Chancellor there expresses his disapproval of Vice-Chancellor *Shadwell's* decision in *Hall* v. *Macdonald* as reported, and thinks the reporter must have misunder-

(1) 14 Sim. 1.
(2) 1 Russ. 538.
(3) Law Rep. 14 Eq. 379.
(4) 1 S. & S. 458.
(5) Law Rep. 12 Eq. 570.

stood him. Commenting on the Act Vice-Chancellor *Wickens* says (1): "The rule laid down by the statute, 3 & 4 Will. 4, c. 104, is anomalous. I believe that it cannot be reconciled with the principles of equity, but it must be rested entirely upon decisions, and upon the words of the statute. The trustee of an estate devised for sale, and who is not an executor, has no right whatever analogous to that of an executor who is a creditor." Looking, then, at the words of the statute, no right of retainer is reserved to the heir or devisee, and moreover there is no authority to be found that the heir, *quâ* heir, has a right of retainer. *Player* v. *Foxhall* (2) was really the case of an executor. In *Ferguson* v. *Gibson* (3) the devisee was a specialty not a simple contract creditor: but the question as to the general right of retainer of a devisee under the statute does not appear really to have been argued. Prior to the statute a man's real estate was not assets for payment of his debts, but the statute now makes it assets in equity, and provides that the administration of those assets shall take place in Courts of Equity; that is to say, according to the rules of administration adopted in Courts of Equity. In the case of an executor the right of retainer as recognised by Courts of Equity was in substance a common law right as creditor to sue himself; but where real estate is made assets in Equity the heir can only come in Equity to get the proceeds of the real estate, and upon the principle that "equality is equity" he cannot claim in respect of a debt due to him any priority over other creditors.

Romer, in reply:—

Before *Hinde Palmer's Act* of 1869 (32 & 33 Vict. c. 46), which abolished the priority of specialty over simple contract debts of persons dying after the 1st of January, 1870, the right of the heir to retain out of the proceeds of sale money due to him as a specialty creditor was clear; and I submit that the effect of the Act 3 & 4 Will. 4, c. 104—which rendered the heir liable to a suit in Equity by a specialty or simple contract creditor in the same way that he was liable before the passing of the Act to a suit by a specialty creditor in which the heir was not bound—was

(1) Law Rep. 12 Eq. 573. (2) 1 Russ. 538.
(3) Law Rep. 14 Eq. 379.

CHITTY, J. 1883 *In re* ILLIDGE. DAVIDSON *v.* ILLIDGE.

to give the heir as a simple contract creditor the same rights as he had previously possessed as a specialty creditor, including his right of retainer. The only difference made in the law by *Hinde Palmer's Act* was to equalise specialty and simple contract debts by repealing the proviso at the end of the former Act 3 & 4 Will. 4, c. 104: it did not affect the right of retainer: *Crowder* v. *Stewart* (1).

At all events, if I have not a right of retainer out of the proceeds of the real estate, I have such a right out of the rents now in my hands.

Warrington, for other parties.

CHITTY, J.:—

In this case the real estate has been sold under the jurisdiction conferred upon the Court by the Act 3 & 4 Will. 4, c. 104, and the question is whether the heir is entitled to retain a simple contract debt out of the proceeds of the sale.

The Act, which is one of a series rendering real estates liable for the payment of debts of a deceased person, enacts, in substance, that where the real estate of the deceased has not been charged with or devised subject to the payment of debts, "the same"—that is the real estate—"shall be assets to be administered in Courts of Equity for the payment of the just debts of such persons, as well as debts due on simple contract as on specialty." That is the cardinal enactment in this statute—that the real estate shall be assets administered in Courts of Equity: that means it must be administered in Courts of Equity according to the principles adopted by Courts of Equity in the administration of assets.

Now it is an acknowledged principle of Equity that where there are equitable assets all creditors are to be paid *pari passu* out of such assets without any recourse to legal priority whatever. The statute has not conferred any right of retainer upon the heir or devisee in express terms.

The question is now raised whether by implication or otherwise the heir or devisee has not such a right of retainer.

(1) 16 Ch. D. 368.

I should say that there is no distinction made, and none could be made, between the case of an heir and that of a devisee of real estate. The right of retainer was a legal right—a right not conferred by Courts of Equity, but acknowledged by Courts of Equity in the administration of dead men's estates where that right existed at Common Law.

The grounds upon which the right originated at Common Law are obvious. I will take the case of an executor first. A creditor suing an executor sued only on his own behalf. The judgment at Common Law was of the simplest kind: if there were assets the creditor recovered his own debt and his own debt only. That was one ground. Another ground was that the executor had a right, among creditors of an equal degree, to prefer one to another. The third ground was (and it was an obvious principle of law) that the executor could not sue himself. Putting these three reasons together, it was obvious that unless the executor could retain, the executor would at Common Law have lost his debt, and would have been compelled to pay a creditor of equal degree before himself, notwithstanding the right he had at Common Law.

Those are the principles upon which the right of retainer in favour of the executor was established; and in the analogous case where the heir was sued, or, after the Statute of Fraudulent Devises of *William* and *Mary*, the devisee was sued, the same principles applied: the heir or devisee could only be sued on those contracts which were under seal where the heirs were bound; and for the very same reasons I have mentioned it was obvious that the right of retainer must have effect given to it. But in a Court of Equity the right has only been acknowledged and not conferred, because the decrees of Courts of Equity in the administration of assets were decrees not obtained solely for the benefit of the particular creditor suing but for the benefit of all creditors.

It appears to me that on the true construction of the statute, when the Legislature enacted that real estate should be assets to be administered in Courts of Equity—thus creating a new liability on the part of the real estate with regard to simple contract debts—if it had been intended that any right of retainer should be conferred on the heir or devisee, such a right would

CHITTY, J. 1883 *In re* ILLIDGE. DAVIDSON *v.* ILLIDGE.

have been expressed. I find, however, no such expression in the Act, subject to what I am about to mention.

I hold therefore, on the principle that assets which are to be administered in Courts of Equity are therefore to be administered in accordance with the doctrines of those Courts, that there is no right of retainer out of real estate which is made assets by the statute.

In the analogous case where lands were charged by will with payment of debts, if the legal estate descended the heir had no right of retainer; and if the estate was devised subject to a charge of debts the devisee also had no right of retainer. As was pointed out by Vice-Chancellor *Wickens* in the case of *Bain* v. *Sadler* (1), a trustee of an estate devised for sale, and who is not an executor, has no right analogous to that of an executor. At the end of the Act 3 & 4 Will. 4, c. 104, there is a proviso "that in the administration of assets by Courts of Equity under and by virtue of this Act, all creditors by specialty in which the heirs are bound shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty in which the heirs are not bound shall be paid any part of their demands." Since that Act came into operation (which is now upwards of forty years ago) I have never heard of the question having been raised as to the right of the heir or devisee to retain, except in the case of *Ferguson* v. *Gibson* (2), where it does appear Vice-Chancellor *Wickens* allowed a retainer on the part of the devisee in respect of a specialty debt.

It appears to me that that decision may be supported entirely by, and ought to be attributed solely to, the proviso at the end of the section which I have read, because that proviso retained the priority possessed by creditors by specialty in which the heirs were bound; and it appears to me the Vice-Chancellor was warranted in saying that the right of retainer in respect of a specialty debt in which the heirs were bound was preserved as being part of the law which admitted the preference or priority of specialty debts of that nature. That proviso is, however, now repealed by the Act which came into operation in 1870. It appears to me that with the repeal of the proviso there has also

(1) Law Rep. 12 Eq. 570. (2) Law Rep. 14 Eq. 379.

fallen to the ground the right which, in my opinion, was reserved by the proviso, and that that right is gone. The claim of the heir in this case is not, however, in respect of a specialty debt, but merely of a simple contract debt. With the exception of *Ferguson* v. *Gibson* (1), as I have said, though more than forty years have elapsed, there is no reported case in which this point has been raised. It has never been raised, I believe, because there has been a common consent on the part of the profession that such a right did not exist.

However that may be, I hold that, upon the true construction of this statute, neither the heir nor the devisee has any right to priority and no right of retainer in respect of a simple contract debt, or indeed, at the present time, of a specialty debt. I have nothing to do with a judgment debt.

There is one other point which Mr. *Romer* argued: it is a simple question. It was said that if the heir was not entitled to a right of retainer as against the proceeds of sale of the real estate, at any rate he was entitled to a right of retainer as against the rents; but, as I have already pointed out, the statute makes real estate assets to be administered in Courts of Equity for payment of debts as from the death of the testator, and the rents are but part of the real estate. The statute does not enact that merely the proceeds of sale of real estate, but that the whole of the real estate shall be assets.

I hold therefore that in this case the heir has no right of retainer for his simple contract debt, either out of the proceeds of the real estate or out of the rents.

Solicitors: *Davidson & Morriss; Tatham, Oblein & Nash; Potter, Sandford & Kilvington.*

(1) Law Rep. 14 Eq. 379.

G. I. F. C.

NORTH, J.

1883

July 12.

In re WRIGHT'S TRUSTS.

Settled Land Act, 1882—*Payment of Money out of Court—Appointment of Trustees.*

Where a testator's daughter was beneficial tenant for life of a fund paid into Court upon the compulsory purchase of the testator's property, the daughter being one of the two trustees of the will, and both trustees being desirous of resigning their trusts; and there being no power of sale in the will.

The Court appointed two new trustees of the settlement effected by the will for the purposes of the *Settled Land Act*, 1882, and ordered the fund to be paid out to such trustees, to be held by them upon the trusts of the will.

CHARLES WRIGHT, by his will, dated the 16th of March, 1852, devised to *George Wright* and *Thomas Munday* two freehold houses in *Lime Street Passage*, *Leadenhall Market*, upon trust to pay the rents and annual proceeds thereof to his daughter *Mary Ann Wright* for life, and then to any husband she might marry for life, and then to stand possessed of the property for the benefit of the children of his daughter *Mary Ann Wright*, but if his said daughter should die without children, then to his son *Edward Wright*, his heirs and assigns, and the testator gave another freehold house in the same street to trustees for the benefit of his daughter *Lydia Waters*, and upon similar trusts to those declared in respect of the two other freehold houses.

Mary Ann Wright had never been married. *Lydia Waters* had married, but her husband died in July, 1871, and there were no children of the marriage.

The trustee, *George Wright*, died in July, 1863, and *James Turner* and the said *Mary Ann Wright* were appointed trustees of the will in the place of *George Wright* and *Thomas Munday*.

The three houses devised by the will of *Charles Wright* had been purchased by the corporation of *London* for the purposes of the *Leadenhall Market Act*, 1879, and the purchase-money, amounting to £8000, was paid into Court.

A petition was now presented by *James Turner* and *Mary Ann Wright*, the trustees of the will of *Charles Wright*, stating that they were desirous of being discharged from the trusts of the will,

and praying that *Joseph Smith* and *Benjamin Mellon*, or some other fit persons, might be appointed trustees of the will for the purposes of the *Settled Land Act*, 1882; that the sum of £8000 so paid into Court by the corporation of the city of *London*, in respect of the said three freehold houses to which *James Turner* and *Mary Ann Wright* were entitled without power of sale, might be paid to the said *Joseph Smith* and *Benjamin Mellon*, or to such trustees as the Court should appoint.

Chadwyck Healey, in support of the petition, submitted that the order for payment of this money out of Court might be made under the *Settled Land Act*, 1882, to the trustees of the will, who could be appointed for the purposes of the Act.

By the 32nd section of the *Settled Land Act* money paid into Court under the *Lands Clauses Acts* may be applied as capital moneys arising under the former Act. Sect. 21 prescribes the modes in which capital money may be applied, including, by sub-sect. ix., payment to any person empowered to give an absolute discharge. Sect. 40 makes the receipt of the trustees of the settlement such a discharge. Sect. 38 supplies the machinery for the appointment of trustees of a settlement.

He referred to *In re Evans' Settlement* (1), where the purchase-money of an estate had been ordered to be paid out to the trustees of the settlement on the petition of the tenant for life; the trustees undertaking to hold the money upon the trusts of the settlement.

Then, in *In re Hobson's Trusts* (2), an order was made for the payment out to the trustees of a settlement (containing a power of sale) as persons absolutely entitled, and a similar order was made in *In re Gooch's Estate* (3), where the *cestui que trust* was an infant.

He also referred to the order made in *In re Harrop's Trusts* (4).

Sir A. T. Watson, for the Corporation.

Davenport, amicus Curiæ, stated that Mr. Justice *Chitty* had recently considered the question, and had held that even if there

(1) 14 Ch. D. 511.
(2) 7 Ch. D. 708.
(3) 3 Ch. D. 742.
(4) *Post*, p. 717.

NORTH, J. 1883 *In re* WRIGHT'S TRUSTS.

were not power to make the order the same result would be attained by an investment in land followed by a direction by the tenant for life for an immediate sale, upon which the proceeds would clearly be payable to the trustees of the settlement, which would come to the same thing.

NORTH, J., considered that he ought to follow the form of order made by Mr. Justice *Pearson* in *In re Harrop's Trusts* (1), and he should therefore direct that the persons proposed as new trustees, who had been certified as fit persons for the office, should be appointed trustees of the settlement effected by the will, for the purposes of the *Settled Land Act*; and that the fund in Court paid in upon the purchase of the property devised by the testator's will should be paid out to such trustees, to be held by them upon the trusts of the will.

Solicitors: *A. E. Copp; Wright.*

T. W. G.

NORTH, J. 1883 *July* 23.

In re WILSON. PARKER *v.* WINDER.

[1881 W. 1135.]

Will—Construction—"According to the Stocks."

A testator gave the income of a trust fund to his wife for her life, and subject thereto the fund was to be held in trust for such of his cousins (the children of four deceased aunts and two deceased uncles of the testator named in the will) living at the determination of the wife's life interest, and such issue then living (if any) of his said cousins then dead as, either before or after the determination of such life interest, should attain twenty-one, or should die under twenty-one leaving issue living at his, her, or their death, to take (if more than one) in a course of distribution according to the stocks, and not according to the number of individuals. At the time of the death of the tenant for life there were living one cousin of the testator (a child of one of the uncles named in the will), and children and other issue of fifteen deceased cousins (children of the other uncle and of the four aunts named in the will):—

Held, that the words "according to the stocks" applied to the descend-

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(1) *Post*, p. 717.

ants of cousins, and not to the cousins themselves, and that the fund was divisible into sixteen shares.

Robinson v. *Shepherd* (1) preferred to *Gibson* v. *Fisher* (2).

FURTHER CONSIDERATION.

This action was brought for the execution under the direction of the Court of the trusts of the will of *Thomas Wilson* concerning his residuary estate.

The testator by his will, dated the 19th of July, 1845, devised and bequeathed his real estate and the residue of his personal estate to trustees, upon trust for sale and conversion and investment as therein mentioned, and upon trust out of the annual produce to pay certain annuities, and subject thereto the aggregate fund was to be held upon certain trusts for his children or child (which failed by reason of his not having had any child) and subject thereto on trust to pay certain legacies and other annuities, and subject thereto he directed that the aggregate fund should be held in trust for such of his cousins, the children of his late aunts, *Grace Dickson*, deceased, *Nancy Silcock*, deceased, *Isabella Townsend*, deceased, and *Jenny Brown*, deceased, and of his late uncles, *Thomas Winder*, deceased, and *William Winder* deceased, living at the failure of the preceding trusts in favour of his child or children or the determination of the life interest thereinbefore given to his said wife in the said fund (which should last happen) and such issue then living, if any, of his said cousins then dead as either before or after the failure of such trusts or the determination of such life interest (which should last happen) should attain the age of twenty-one years, or should die under the said age of twenty-one years leaving issue living at his, her, or their decease (except two cousins mentioned by name and their respective issue) to take, if more than one, in a course of distribution according to the stocks, and not to the number of individuals.

The testator died without issue in 1848; his widow died in May, 1880. At the death of the widow there was living *J. H. Winder*, a cousin of the testator, the only child of his uncle, *William Winder*, and there were also living children and other issue of fifteen deceased cousins of the testator (children of the uncle *Thomas Winder* and the aunts mentioned in the will), other than

(1) 4 D. J. & S. 129. (2) Law Rep. 5 Eq. 51.

NORTH, J. 1883 *In re* WILSON. PARKER *v.* WINDER.

the two excepted cousins. *J. H. Winder* was the only cousin living.

Everitt, Q.C., and *Hamilton Humphreys*, for the trustees, stated the case.

Badcock, for *J. H. Winder* and for the only child of the only child of the testator's aunt, *Grace Dickson*:—

The uncles and aunts are to be taken as the stocks, and the fund is divisible in sixths. If each of the sixteen cousins is to take an equal share, that will be distributing the fund *per capita*, not *per stirpes*. The testator does not say that each cousin is to form a separate stock. When there is a gift *per stirpes* the *stirps* must be found at the earliest possible point. The cousins here are to take according to the stocks, and the uncles and aunts must be the stocks: *Gibson* v. *Fisher* (1). In that case Lord *Romilly*, M.R., declined to follow Lord *Westbury's* decision in *Robinson* v. *Shepherd* (2).

E. Thurstan Holland, for issue of deceased cousins:—

The fund is divisible into sixteenths. The cousins themselves are to be taken as the stocks, and then the devolution is *per stirpes*. The words "according to the stocks" are intended to limit the generality of the word "issue;" there was no reason for using them in reference to the cousins themselves. The uncles and aunts are mentioned only for the purpose of identifying the cousins who, or whose issue, were to take. *Gibson* v. *Fisher* is not really an authority against me, and if it is, *Robinson* v. *Shepherd*, being a decision of the Court of Appeal, must be preferred.

J. F. Hole Bethell, and *T. W. Ratcliff*, for other persons in the same interest.

Badcock, in reply:—

The mention of the uncles and aunts shews an intention that they are to be taken as the stocks. Suppose all the cousins had survived the tenant for life, would they have taken *per stirpes* or *per capita*?

(1) Law Rep. 5 Eq. 51. (2) 4 D. J. & S. 129.

[NORTH, J.:—The words "according to the stocks" apply only when the persons to take are of different generations.]

The principle is laid down in *Gibson* v. *Fisher* (1), and *Robinson* v. *Shepherd* (2) is not really inconsistent with it.

NORTH, J. (after reading the provisions of the will continued):—

The question is, where am I to look for "the stocks?" The legatees under the will are the persons whose shares are to be distributed in this way, and this appears to me to indicate an intention that the legatees themselves are to be looked to as the origins of the stocks rather than any other persons outside them. The same idea seems to have occurred to the Lord Chancellor in *Robinson* v. *Shepherd*, for he says (3), "The Master of the Rolls has applied the words '*per stirpes*' as denoting the sisters of the testator's grandfather, from whom the present claimants originally take. But the will does not direct a division of the sale moneys in question into as many families as there might be brothers and sisters of his grandfather who had died leaving issue, but a division amongst the descendants themselves as purchasers, as simple legatees—such descendants, however, being arranged, *inter se*, according to the principle of families, and not according to the principle of individuals. And, in my judgment, as I have said, the words '*per stirpes*' refer to the descendants; the expression then giving the rule of selection according to the principle of the stocks to be found amongst those descendants." That seems to me to indicate that the legatees named in the will—the persons who are described as taking the shares—are to be regarded as the stocks. Here I find that cousins of the testator are the persons who are in the first instance named as legatees, and I think that the stocks referred to must, *primâ facie*, be found in that generation, especially as the issue of deceased cousins are to take in their place. Who are the "stocks" as regards the children of deceased cousins? Certainly the deceased cousins themselves. As soon as you have reached the cousins you have done all that is necessary; you are not to go back to any prior generation. I find on the face of the will that you must look to

(1) Law Rep. 5 Eq. 51. (2) 4 D. J. & S. 129.
(3) 4 D. J. & S. 131.

NORTH, J. 1883 *In re* WILSON. PARKER *v.* WINDER.

the cousins themselves as the stocks for one purpose. *Gibson* v. *Fisher* (1) seems to me a totally different case. There the gift was to the descendants of the uncles and aunts of the testator, and there was no distinction on the face of the will between one generation and another. The only stocks indicated were the uncles and aunts. In the present case that is not so, because an intermediate generation—that of cousins—is mentioned, and they are certainly referred to as stocks for one purpose—for the purpose of ascertaining who are the issue who are to take in the event of the death of any of the cousins. In this respect *Gibson* v. *Fisher* was entirely different. If, however, those two cases were authorities exactly applicable to the present case, and I had to choose between them, I should follow *Robinson* v. *Shepherd* (2) in preference to *Gibson* v. *Fisher*. This settles the question how far back you are to go in order to discover the stocks which are intended by the testator.

Then comes the question how far you are to go down, and I do not see where you are to stop. The words seem to me to apply to every generation, and both *Robinson* v. *Shepherd* and *Gibson* v. *Fisher* are authorities for that view. You must take in all the descendants of the stocks. This is in accordance with what Lord *Westbury* said in *Robinson* v. *Shepherd;* and in *Gibson* v. *Fisher* Lord *Romilly*, M.R., said (3), "I am of opinion that the whole residue must be divided *per stirpes* from the beginning, and that the rule of *stirpes* must run through every descent, considering that '*per stirpes*' is an expression which means that all the persons who are to take are to take *per stirpes*, and that this must run through the whole range of the descents." I shall, therefore, make a declaration that the words "according to the stocks" are applicable to the descendants of cousins, and not to the cousins themselves. The fund will be divided into sixteen shares.

Solicitors: *Crowder, Anstie, & Vizard*, agents for *Clark & Co., Lancaster; W. W. Wynne & Son; Robert Helsham.*

(1) Law Rep. 5 Eq. 51. (2) 4 D. J. & S. 129. 18 June 83
(3) Law Rep. 5 Eq. 58.

W. L. C.

In re LEE AND HEMINGWAY.

NORTH, J.

1883

July 28.

Company—Compulsory Purchase of Land—Owner under Disability—Money in Court—Payment out—Costs—Discretion of Court—Rules of Court, 1875, *Order* LV.

When the purchase-money of land, taken by a company under compulsory powers conferred on them by a special Act passed before the *Judicature Act*, has been paid into Court by reason of the disability of the person entitled to the land, the Court has, under the general discretion as to costs given to it by Order LV., power to order the company to pay the costs of a petition for payment of the money out to a person absolutely entitled, even though the special Act contains no provision to that effect.

Ex parte Mercers' Company (1) followed.

PETITION.

This was a petition for the application and disposition of a sum of £270 which had been paid into Court by the *Aire and Calder Navigation Company* as the purchase-money of land compulsorily taken by them in the year 1833, under the powers of their special Act, 9 Geo. 4, c. xcviii. The money belonged, as to one moiety, to two of the Petitioners as trustees of the will of *Shepley Watson*, and as to the other moiety to another of the petitioners as executor of *John Lee*, and the petition asked that the moiety belonging to *Watson's* trustees might be paid to them, they undertaking to apply it in the redemption of land tax affecting other property vested in them as such trustees, and that the other moiety might be paid to *John Lee's* executor as part of *John Lee's* personal estate. The petition also asked that the taxed costs of the Petitioners of and incidental to and consequent upon the application and of the order to be made thereon might be paid by the company.

Sect. 34 of the special Act provided that the money agreed or awarded to be paid for any lands purchased, taken, or used under the powers of the Act for the purposes thereof, which should belong to any tenant for life or in tail, or person or persons under any disability or incapacity, should be paid into Court, to the intent that it should be applied under the direction of the Court,

(1) 10 Ch. D. 481.

NORTH, J.
1883
In re LEE AND HEMINGWAY.

to be signified by an order made upon petition by the persons entitled to the rents and profits of the lands, in the purchase of the land tax, or the discharge of incumbrances affecting the same lands, or other lands settled to the like uses, or when such money should not be so applied, then the same should be laid out under the direction of the Court in the purchase of other lands to be settled to the same uses.

Sect. 39 provided that where, by reason of any disability or incapacity of the person or persons entitled to any lands, tenements, or hereditaments to be purchased under the authority of the Act, the purchase-money for the same should be required to be paid into Court, and to be applied in the purchase of other lands, tenements, or hereditaments to be settled to the like uses, "it shall be lawful for the said Court to order the expenses of all purchases from time to time to be made in pursuance of this Act, or so much of such expenses as the said Court shall deem reasonable, to be paid by the said undertakers, out of the moneys to be received by virtue of this Act, who shall from time to time pay such sums of money for such purposes as the said Court shall direct."

The Act contained no provision as to the payment of the costs of a petition for the payment of money out of Court to a person absolutely entitled thereto.

Charles Browne, for the Petitioners:—

The only question is what costs the company ought to pay. Under Order LV. the Court has a general jurisdiction as to costs, and can order the company to pay the costs of a petition for payment out of Court to a person absolutely entitled: *In re Merceron* (1); *Ex parte Hospital of St. Katharine* (2); *Ex parte Mercers' Company* (3).

At any rate, under the special Act there is power to order the company to pay the costs of a petition for the investment of one moiety in the redemption of land tax, which is the purchase of a hereditament, and the costs of the petition have not been increased by asking for the payment out of the other moiety.

(1) 7 Ch. D. 184. (2) 17 Ch. D. 378.
(3) 10 Ch. D. 481.

Method, for the company :—

The decision of Jessel, M.R., in *Ex parte Mercers' Company* (1) is founded on his interpretation of the decision of the House of Lords in *Garnett* v. *Bradley* (2). He appears to have been wrong in his view of the effect of that decision; it does not apply to the provisions of special private Acts. It would be contrary to the general rule of law to say that the provisions of a special private Act, which is in the nature of a contract between parties, can be altered by a subsequent general Act which does not refer to it.

As to the other point, the Act only authorizes the Court to order the company to pay the expenses of a purchase of "lands, tenements, or hereditaments." Redeemed land tax is personal estate: 38 Geo. 3, c. 60, s. 99.

NORTH, J. :—

I shall follow *Ex parte Mercers' Company*. I do not think it necessary to go into any question of principle: for it seems to be settled by that decision and by the course of practice since, which I am bound to follow. I do so because it has been so decided, and I know that the course of practice since has been in accordance with that decision. It is not that the *Judicature Act* has repealed any one of these special Acts, but it has supplied something which was not to be found in them, viz., a discretionary jurisdiction as to costs in all cases. This money has been paid into Court in respect of the taking of land compulsorily by the company, and, as I have a discretion, I think I ought to exercise it by ordering the company to pay the costs of a petition to get the money out. I think that *Ex parte Mercers' Company* shews that I have that discretion.

Solicitor for Petitioners: *T. W. Nelson.*
Solicitors for Company: *Evans, Foster, & Wadham.*

(1) 10 Ch. D. 481. (2) 3 App. Cas. 944.

W. L. C.

NORTH, J.
1883
July 23, 24, 30.

In re SMITH.
GREEN *v.* SMITH.

[1881 S. 5470.]

Undischarged Bankrupt—Close of Bankruptcy — After-acquired Property — Death of Bankrupt within Three Years after Close—Rights of Old Creditors —Administration Action—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 12, 15, 47, 48, 49, 54.

An undischarged bankrupt died intestate within three years after the close of his bankruptcy, having in the interval acquired fresh property and contracted fresh debts. Only a small dividend had been paid in the bankruptcy, and the bankrupt had not, after the close of the bankruptcy, made any further payments to the creditors who had proved. An action was brought by one of the new creditors to administer the bankrupt's estate. The estate was sufficient to pay the costs of the action, to pay the new creditors in full, and to leave a surplus. This surplus was claimed by the old creditors:—

Held, that the administratrix was entitled to the surplus, and that the old creditors had no right to it.

The creditors of an undischarged bankrupt under the Act of 1869 have no rights against property acquired by him after the close of the bankruptcy, except such rights as are given to them by sect. 54, and those rights cannot be enforced after the death of the bankrupt.

Sect. 12 applies to property acquired by an undischarged bankrupt after the close of the bankruptcy as well as to property divisible among the creditors in the bankruptcy.

Ex parte Kelly (1) explained.

FURTHER CONSIDERATION.

This action was brought by a creditor for the administration of the personal estate of *Richard Smith*, who died intestate on the 15th of June, 1881. The Defendant was his administratrix. On the 20th of December, 1881, the ordinary administration judgment was pronounced. The intestate had been on the 30th of October, 1877, adjudicated a bankrupt. Two dividends respectively of 1*s.* 6*d.* in the pound and one-eighth of a penny in the pound were paid in the bankruptcy in September, 1879, and May, 1880. On the 10th of December, 1880, an order was made by the Court of Bankruptcy closing the bankruptcy. No further dividend had been paid. The bankrupt did not obtain an order of discharge,

(1) 7 Ch. D. 161.

and he did not after the close of the bankruptcy make any further payments to the creditors who had proved. It did not appear whether a release was granted to the trustee. After the close of the bankruptcy the bankrupt acquired fresh property and contracted fresh debts. The Plaintiff in this action was a creditor whose debt had been contracted since the close of the bankruptcy.

By the certificate of the Chief Clerk in the action, dated the 25th of April, 1883, it appeared that the debts due by the intestate to the Plaintiff and other creditors whose debts had been contracted since the close of the bankruptcy amounted to £340 1*s.* 11*d.* These debts had been allowed by the Chief Clerk, and were set forth in the first schedule to the certificate. Other persons, who were creditors who had proved their debts in the bankruptcy, had also brought in claims for the balances unpaid of their respective debts, but these claims the Chief Clerk had disallowed. They were set forth in the second schedule, and they amounted to more than £14,000. The estate of the intestate was sufficient to pay the costs of the action and the debts in the first schedule, and to leave a surplus.

The action now came on to be heard on further consideration, and on a summons by *Bell, Nott, & Co.*, who were creditors who had proved in the bankruptcy, asking that the surplus might be paid rateably among the creditors whose debts were set forth in the second schedule.

Yate Lee, for the Plaintiff, and for *Bell, Nott, & Co.*:—

The question depends upon the construction of sects. 47 and 54 of the *Bankruptcy Act*, 1869 (1). The decisions under the old

(1) Sect. 12 provides that "Where a debtor shall be adjudicated a bankrupt, no creditor to whom the bankrupt is indebted in respect of any debt provable in the bankruptcy shall have any remedy against the property or person of the bankrupt in respect of such debt except in manner directed by this Act. But this section shall not affect the power of any creditor holding a security upon the property of the bankrupt to realize or otherwise deal with such security in the same manner as he would have been entitled to realize or deal with the same if this section had not been passed."

Sect. 15 provides that "the property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt," shall (*inter alia*) comprise "(3.) All such property as may belong to or be vested

NORTH, J. 1883 *In re* SMITH. GREEN *v.* SMITH.

Insolvent Debtors Acts apply by way of analogy, and shew that the Chancery Division has jurisdiction to administer the estate

in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him during its continuance."

Sect. 47: "When the whole property of the bankrupt has been realised for the benefit of his creditors, or so much thereof as can, in the joint opinion of the trustee and committee of inspection, be realized without needlessly protracting the bankruptcy, or a composition or arrangement has been completed, the trustee shall make a report accordingly to the Court, and the Court, if satisfied that the whole of the property of the bankrupt has been realized for the benefit of his creditors, or so much thereof as can be realized without needlessly protracting the bankruptcy, or that a composition or arrangement has been completed, shall make an order that the bankruptcy has closed, and the bankruptcy shall be deemed to have closed at and after the date of such order."

Sect. 48: "When a bankruptcy is closed, or at any time during its continuance, with the assent of the creditors testified by a special resolution, the bankrupt may apply to the Court for an order of discharge; but such discharge shall not be granted unless it is proved to the Court that one of the following conditions has been fulfilled, that is to say, either that a dividend of not less than 10*s.* in the pound has been paid out of his property, or might have been paid except through the negligence or fraud of the trustee, or that a special resolution of his creditors has been passed to the effect that his bankruptcy, or the failure to pay 10*s.* in the pound; has, in their opinion, arisen from circumstances for which the bankrupt cannot justly be held responsible, and that they desire that an order of discharge should be granted to him, and the Court may suspend for such time as it deems to be just, or withhold altogether, the order of discharge in the circumstances following; viz., if it appears to the Court on the representation of the creditors made by special resolution, of the truth of which representation the Court is satisfied, or by other sufficient evidence, that the bankrupt has made default in giving up to his creditors the property which he is required by this Act to give up; or that a prosecution has been commenced against him in pursuance of the provisions relating to the punishment of fraudulent debtors, contained in the *Debtors Act*, 1869, in respect of any offence alleged to have been committed by him against the said Act."

By sect. 49: "An order of discharge shall not release the bankrupt from any debt or liability incurred by means of any fraud or breach of trust, nor from any debt or liability whereof he has obtained forbearance by any fraud, but it shall release the bankrupt from all other debts provable under the bankruptcy, with the exception of

"(1.) Debts due to the Crown.

"(2.) Debts with which the bankrupt stands charged at the suit of the Crown or of any person for any offence against a statute relating to any branch of the public revenue, or at the suit of the sheriff or other public officer on a bail bond entered into for the appearance of any person prosecuted for any such offence."

Sect. 54: "Where a person who

of the deceased bankrupt for the benefit of the unsatisfied creditors under the bankruptcy, subject to the rights of the new creditors whose debts have been contracted since the close of the bankruptcy: *Barton* v. *Tattersall* (1); *Ward* v. *Painter* (2); *Galsworthy* v. *Durrant* (3). An opinion to the same effect was intimated by Lord Justice *James* in *Ex parte Kelly* (4).

Cooper Willis, Q.C., and *E. Brodie Cooper*, for the administratrix:—

When judgment had been entered up against the insolvent under the *Insolvent Debtors Acts* it bound all his after-acquired property. It gave the assignee a lien or charge on that property for the benefit of the creditors, and the Court of Chancery had power after the death of the debtor to enforce that lien or charge against

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has been made bankrupt has not obtained his discharge, then, from and after the close of his bankruptcy, the following consequences shall ensue:—

"(1.) No portion of a debt provable under the bankruptcy shall be enforced against the property of the person so made bankrupt until the expiration of three years from the close of the bankruptcy; and during that time, if he pay to his creditors such additional sum as will, with the dividend paid out of his property during the bankruptcy, make up 10*s.* in the pound, he shall be entitled to an order of discharge in the same manner as if a dividend of 10*s.* in the pound had originally been paid out of his property:

"(2.) At the expiration of a period of three years from the close of the bankruptcy, if the debtor made bankrupt has not obtained an order of discharge, any balance remaining unpaid in respect of any debt proved in such bankruptcy (but without interest in the meantime) shall be deemed to be a subsisting debt in the nature of a judgment debt, and, subject to the rights of any persons who have become creditors of the debtor since the close of his bankruptcy, may be enforced against any property of the debtor, with the sanction of the Court which adjudicated such debtor a bankrupt, or of the Court having jurisdiction in bankruptcy in the place where the property is situated, but to the extent only, and at the time and in manner directed by such Court, and after giving such notice and doing such acts as may be prescribed in that behalf."

(1) 1 Russ. & My. 237.
(2) 5 My. & Cr. 298.
(3) 2 D. F. & J. 466.
(4) 7 Ch. D. 161, 163.

NORTH, J. his estate. That is the explanation of such cases as *Barton* v. *Tattersall* (1) and *Ward* v. *Painter* (2). If judgment had not been entered up before the death of the insolvent the Court of Chancery could give no remedy to the creditors under the insolvency, and they had no rights against his after-acquired property. The provisions of the *Bankruptcy Act*, 1869, are different from those of the *Insolvent Debtors Acts*, and they alone govern the present case. The decisions on the old Acts do not apply. In cases of fraudulent preference the Court of Appeal has recently said that regard must be had simply to the words of the Act: *Ex parte Griffith* (3); *Ex parte Hill* (4). Sect. 12 deprives the old creditors of any remedy against the property of the bankrupt, except in the manner directed by the Act, and after the close of the bankruptcy the only manner directed is that which is pointed out in sect. 54. The remedy there provided is inapplicable after the death of the bankrupt, but there is no other: *In re Pettit's Estate* (5). The same view of the Act was expressed by Lord Justice *Fry* on a former hearing of this case on another point: *In re Smith* (6). There is no lien or charge on the bankrupt's after-acquired property in favour of the old creditors, such as that which was created by the judgment entered up under the Insolvent Acts; the only right is under sect. 54. In cases of fraud no doubt the Court could re-open the bankruptcy notwithstanding the closing.

1883

In re SMITH. GREEN *v.* SMITH.

[NORTH, J., referred to *Ex parte Welchman* (7).]

That case depended on the special provisions of the Act 5 & 6 Vict. c. 116. The opinion expressed by *James*, L.J., in *Ex parte Kelly* (8) was merely *obiter dictum*. The old creditors are really claiming to attach the bankrupt's property before they have obtained a judgment: *Robinson* v. *Pickering* (9).

Yate Lee, in reply:—

Sect. 12 applies only to property of the bankrupt divisible

(1) 1 Russ. & My. 237.
(2) 5 My. & Cr. 298.
(3) 23 Ch. D. 69.
(4) Ibid. 695.
(5) 1 Ch. D. 478.
(6) 22 Ch. D. 586.
(7) 11 Ch. D. 48.
(8) 7 Ch. D. 161, 163.
(9) 16 Ch. D. 660.

among his creditors in the bankruptcy; it does not apply to property acquired after the close of the bankruptcy. We are in substance claiming the remedy given by sect. 54.

[NORTH, J.:—That remedy can only be given by the Court of Bankruptcy.]

At any rate the protection given by the first part of sect. 54 does not apply after the death of the bankrupt. Sect. 54 does not take away any rights. The principle of the cases under the *Insolvent Debtors Acts* applies. Bankruptcy is no answer to an action by a creditor, unless the bankrupt has obtained a discharge.

July 30. NORTH, J.:—

The point which arises in this case is a short and, so far as I am aware, a new one. [His Lordship stated the facts, and continued:—]

The question is to whom the surplus, after paying the costs of the action and the debts set forth in the 1st schedule, belongs? The material sections of the *Bankruptcy Act* are the 12th, 15th, 47th, 48th, 49th, and 54th. [His Lordship read sect. 47, and added that sect. 52 and rule 125 of the Rules of 1870 provide for the application subsequently of such part of the bankrupt's property as has not been realized at the close of the bankruptcy. His Lordship also read sects. 48 and 49 and sect. 15, and continued:—] Under these sections it has been decided that property which has been acquired by a bankrupt after he has obtained his discharge, but before the bankruptcy has been closed, or after the bankruptcy has been closed but before he has obtained his discharge, belongs to the bankrupt individually, and not to his trustee or his creditors: *Ebbs* v. *Boulnois* (1); *In re Pettit's Estate* (2).

The 12th section of the Act provides that where a debtor shall be adjudicated a bankrupt, no creditor to whom he is indebted in respect of any debt provable in the bankruptcy shall have any remedy against his property or person in respect of such debt except in manner directed by the Act. It is said that "property"

(1) Law Rep. 10 Ch. 479. (2) 1 Ch. D. 478.

NORTH, J. 1883 *In re* SMITH. GREEN *v.* SMITH.

in that section means "property divisible among the creditors," and nothing more. But I can see no reason, and none has been suggested, why the remedy against the property of the bankrupt given by the 54th section is not a remedy against the property of the bankrupt within the express exception in the 12th section.

Now sect. 54 is as follows:—[His Lordship read sub-sect. 1 of sect. 54.] The object and effect of this section are clearly stated by *Bacon*, C.J., in *Ex parte Lancaster Banking Corporation* (1).

The mode of granting an order of discharge after the close of the bankruptcy is the subject of rules 172–5. The effect of the rules is pointed out by *Bacon*, C.J., at p. 785. The intestate in the present case died long before the end of three years from the close of the bankruptcy, which period will not in fact expire until December next. It does not appear that any further sums were paid by the bankrupt to the creditors after the close of the bankruptcy; at any rate no order of discharge was obtained by him.

Now it is obvious that the word "property" is in sect. 54 used in two totally different senses. The property vested in or acquired by the bankrupt before the close of the bankruptcy has already been devoted to the creditors in a different way, and is referred to in this section as the source from which dividends to an amount of less than 10*s.* in the pound have already been paid. The property protected for three years by this section can only be that which is acquired subsequently to the close of the bankruptcy, as the bankrupt cannot have any other property capable of or requiring protection. [His Lordship read sub-sect. 2 of sect. 54, and added that the mode of giving effect thereto is regulated by rules 183–5.]

It is obvious, again, that the property of the bankrupt there referred to as that against which execution could issue, is that acquired by him after the close of the bankruptcy. That subsection does not affect the present case, for the period of three years has not yet expired, and if it had, the section could only be put in force with the sanction of the Court of Bankruptcy,

(1) 10 Ch. D. 776, 783, 785.

and no such sanction could be given after the death of the bankrupt: see *Ex parte Kelly* (1).

There is not, so far as I am aware, any remedy given or directed by the Act in favour of creditors under a bankruptcy (other than creditors whose rights are preserved by sect. 49) against property acquired by a bankrupt after its close, except as is provided by sect. 54, and it appears to me that the scheme of the Act is to give or preserve to creditors certain rights against the bankrupt and his property, present and future, but, subject to the existence and exercise of the rights so created or preserved, to leave him a free man, and to leave his future property under his own control and at his own disposal. The words of the 12th section seem to me clear upon the point, and if it had been intended that the creditor should have the additional remedy of being able after the bankrupt's death to prove in or commence a suit to administer his estate, I think the Act would have said so.

In *Ex parte Williams* (2) a liquidating debtor, whose liquidation had been closed, presented a second petition for liquidation, and *Bacon*, C.J., decided that no notice of the meeting under the second petition need be given to the unpaid creditors under the first liquidation, as they had no rights against or interest in the debtor's after-acquired property, except under the provisions of sect. 54. And, again, in *In re Pettit's Estate* (3), *Bacon*, V.C., pointed out that the subsisting remedies of creditors under a bankruptcy after its close, against the bankrupt and his property, are defined by the Act and Rules. The observations made by Lord Justice *Fry* in deciding a different point in this very case (4) are strongly confirmatory of the same view of the construction of the Act.

The counsel for the Plaintiff relied, by way of analogy, on *Barton* v. *Tattersall* (5) and *Ward* v. *Painter* (6), as shewing that, after the death of a person who had become insolvent under the old *Insolvent Debtors Acts*, the jurisdiction of the Court of Chancery to administer his estate still continued. But that analogy seems to me rather against the old creditors in the

(1) 7 Ch. D. 161.
(2) Law Rep. 20 Eq. 743.
(3) 1 Ch. D. 478, 479.
(4) 22 Ch. D. 586.
(5) 1 Russ. & My. 237.
(6) 5 My. & Cr. 298.

NORTH, J.
1883
In re SMITH.
GREEN *v.* SMITH.

present case than otherwise. The *Insolvent Debtors Acts* did not, as was pointed out by the Lord Chancellor in *Ward* v. *Painter* (1), destroy or release the debts of the insolvent, and means were provided for giving effect to the rights of the creditors against his after-acquired property, by requiring, under one Act, a judgment to be entered up, under another, a recognizance to be given, and, under a third, a warrant of attorney to enter up judgment to be signed, to be put in force under the order of the Court. In the two cases above-mentioned I gather that the judgment had been signed, but that no order had been made authorizing execution under it during the lifetime of the insolvent, and it is clear that no such order could be made after his death. The judgment of itself, however, would be sufficient to give an existing charge or security upon the debtor's property in respect of debts not extinguished by the insolvency, which, if the debts were still subsisting, would warrant an administration decree in respect of such debts. That the entering up of the judgment was necessary to complete the title of the assignee in the insolvency against the personal representative of the insolvent is shewn by *Holsgrove* v. *Hedges* (2). Again, in *Thomas* v. *Pinnell* (3) and *In re Moylan* (4), a warrant of attorney to enter up judgment had been signed by an insolvent, who subsequently died having after-acquired assets, but judgment had never been entered up, and in each case Lord *Romilly*, M.R., held that the rights of the creditors under the insolvency were confined to those which the Acts gave them, and that, in the absence of such a judgment, an unpaid creditor of the insolvent had no remedy for his debt, and could not file a bill to administer the insolvent's estate. In *Galsworthy* v. *Durrant* (5) a judgment had been entered up, and Lord *Campbell*, L.C., followed *Ward* v. *Painter* and *Barton* v. *Tattersall* (6), though obviously with some reluctance. So again, in *Ex parte Lancaster Banking Corporation* (7), already mentioned, *Bacon*, C.J., recognised the fact that it was the judgment which gave the creditors of the insolvent a charge on the property which he

(1) 5 My. & Cr. 298.
(2) 24 L. J. (Ch.) 456.
(3) 15 Beav. 148.
(4) 16 Beav. 220.
(5) 2 D. F. & J. 466.
(6) 1 Russ. & My. 237.
(7) 10 Ch. D. 776.

might acquire. *Ex parte Welchman* (1) was the case of an insolvent under the Act of 5 & 6 Vict. c. 116, under which no judgment was necessary, and that Act provided for the vesting of the after-acquired property of the insolvent in the assignee, on his filing a copy of his claim, "served personally on the insolvent, or by leaving it at the place of residence mentioned in his notice of petition." After his discharge the insolvent became entitled to a share under a settlement; he died, and, a suit having been instituted to execute the trusts of the settlement, his share was placed to a separate account. The assignee then filed his claim, but, of course, could not serve any copy on the deceased insolvent, but he served a copy of the claim on the administratrix of the insolvent, and then obtained a rule calling on her to shew cause why the fund standing to the separate account should not be transferred to him. It was decided that the Court of Bankruptcy had no jurisdiction, and the application was dismissed. But it was suggested in the course of the judgment (*Barton* v. *Tattersall* (2) having been cited) that the creditors under the insolvency might possibly have filed a bill to have the estate of the deceased insolvent applied in payment of his creditors in a due course of administration. Their right to do so was not, however, before the Court at all, and this point, when it arose for decision, would have been obviously dependent upon the question whether the plaintiffs in such an action were creditors of the intestate whose remedies for their debts had not been exhausted.

In the present case I am of opinion that the cases under the *Insolvency Acts* have no application, and that the right of the present claimants turns upon the language of the *Bankruptcy Act*, 1869, alone.

I ought to refer again to *Ex parte Kelly* (3). That case was in some respects very like the present. *Kelly* was a creditor of *Simmons*, who was adjudicated a bankrupt. The bankruptcy was closed, but no order of discharge was obtained. The bankrupt died more than three years after the close of the bankruptcy, leaving property of considerable value. After his death *Kelly* applied to the Court of Bankruptcy for a declaration (under

(1) 11 Ch. D. 48.
(2) 1 Russ. & My. 237.
(3) 7 Ch. D. 161.

NORTH, J. 1883 *In re* SMITH. GREEN *v.* SMITH.

sect. 54) that his debt should be deemed to be a subsisting debt in the nature of a judgment debt, in order that it might be enforced against the property of the deceased bankrupt in the hands of his executors, or that *Kelly* might be at liberty to institute proceedings in the Chancery Division to administer the bankrupt's estate. The motion was refused by the Registrar, and an appeal from his decision was dismissed by the Court of Appeal, on the ground that nothing could be done under sect. 54 after the bankrupt's death. Lord Justice *James*, however, is reported to have used these words (1): "In *Ward* v. *Painter* (2) the question was whether a suit could be maintained in the Court of Chancery. I do not see why you should not commence an administration action without any leave from the Court of Bankruptcy." The counsel for the old creditors in the present case relied strongly on those words, and any remark of that eminent Judge is deserving of careful consideration. But it is obvious, on reading the whole case and the interlocutory observations of the Lord Justice during the argument, and especially the portion of the argument immediately preceding the judgment, that the observations relied on were merely directed to that part of the motion which asked for leave to commence an administration action. The question whether such action would succeed or fail was not in any way under consideration, and the remarks above mentioned meant no more than this, that no leave from the Court of Bankruptcy was necessary before commencing an administration action. The application for such leave was, therefore, refused.

The question has been fully argued before me, and I have, for the reasons above given, come to the conclusion that the creditors under the bankruptcy are, by the 12th section of the Act, expressly precluded from any remedy against the property of the bankrupt, except in manner directed by the Act, and that this applies to after-acquired property as well as to that which vested in the trustee, because the 54th section does give a remedy against after-acquired property in case the course prescribed by the Act is followed. The modes prescribed do not include the commencement of or proof in an administration action by a

(1) 7 Ch. D. 163. (2) 5 My. & Cr. 298.

creditor, and such action or proof appear to me to be clearly remedies against the bankrupt's property, and as such forbidden by sect. 12.

Although it is not necessary to decide the point, I am further of opinion that under the *Bankruptcy Act* of 1869 these creditors would not have any right to administer the bankrupt's estate in the Chancery Division, even if the bankrupt had lived more than three years after the close of the bankruptcy, and the creditors had in his lifetime obtained the sanction of the Court of Bankruptcy to enforce their debts under sect. 54.

Under these circumstances I must direct the payment of the surplus to the administratrix of the bankrupt.

Bell, Nott, & Co., then waived all right to the sum of £238 1*s.* 9*d.*, which was ordered by Mr. Justice *Fry* (1) to be paid to a separate account, and

NORTH, J., ordered that sum to be carried to the general credit of the action.

Solicitors for Plaintiff: *G. L. P. Eyre & Co.*, agents for *Garnett & Tarbet, Liverpool.*

Solicitors for Administratrix: *J. J. & C. J. Allen*, agents for *George Smith, Tunstall.*

(1) 22 Ch. D. 592.

W. L. C.

NORTH, J.
1883
July 30.

In re DE ROSAZ.
RYMER *v.* DE ROSAZ.

[1876 D. 192.]

Costs—Taxation—Perusal by Solicitor—Exhibits to Affidavits—Special Order—Rules of Supreme Court (Costs), August, 1875, Order VI., Schedule, "Perusals."

Order made that the Taxing Master should be at liberty to allow a special charge for the perusal of exhibits to affidavits, the amount thereof (if any) to be in his discretion.

FURTHER CONSIDERATION.

In this case there were a number of important exhibits to affidavits filed in the action, such as opinions of foreign lawyers on questions of foreign law and translations of foreign documents.

Cozens-Hardy, Q.C., and *Jason Smith*, for the Plaintiffs, asked that a special order might be made allowing the costs of the perusal of these exhibits. The Taxing Master would not, without a special order of the Court, allow the costs of the perusal of exhibits by a solicitor. In *Concha* v. *Murietta* (V.-C. B., May 1, 1880) an order was made that in the taxation of costs the Taxing Master was to be at liberty to allow "a special charge for perusal and consideration of the several documents and exhibits in these suits, the amount thereof to be in the discretion of the Taxing Master."

Higgins, Q.C., and *Shebbeare*; *Glasse*, Q.C., and *F. Bagshawe*; *Cookson*, Q.C., and *F. Brabant*; *W. W. Karslake*, Q.C., and *Fooks*; and *Everitt*, Q.C., and *Manby*, for the various parties.

NORTH, J., made an order in the above form, adding the words "if any" after the words "the amount thereof."

Solicitors: *Taylor, Son, & Humbert*; *W. H. Bennett*; *T. Sismey*; *F. A. Brabant*; *Boxall & Boxall.*

W. L. C.

CAVENDISH *v.* CAVENDISH.

NORTH, J.

1883

Aug. 1.

[1873. C. 180.]

Turnpike Road Bonds—Real Security.

Specific bequest of all moneys, stocks, funds, shares, and other securities, "except mortgages on real and leasehold security":—

Held, that mortgages of turnpike road tolls, and mortgages of turnpike road tolls and toll-houses, were mortgages on real security, and came within the exception in the bequest.

THIS was a suit to administer the estate of General *Henry F. C. Cavendish*, who by his will, dated the 28th of February, 1873, made certain specific bequests, and among them was a specific bequest to his son the Plaintiff, *William Henry Frederick Cavendish*, of all his moneys, stocks, funds, shares and other securities for money, "except mortgages on real and leasehold security."

Among the securities held by the testator at the time of his death were three several mortgages given by the trustees of certain turnpike roads in the county of *York* by way of security for the repayment of money advanced and charged upon the tolls to be levied upon the said roads, and in one case, upon the toll-houses built upon such roads for the purpose of collecting the tolls, as well as upon the tolls collected.

The first of these mortgages was dated in September, 1818, and was in the following form, being the form prescribed and authorized by the Act:—"By virtue of an Act passed in the 17th year of Geo. 3, entitled an Act for making the *Cromford* and *Belper* turnpike road, we, seven of the trustees acting in the execution of the said Act, in consideration of £200 to the treasurer of the said road, in hand paid by Lord *George Augustus Cavendish*, do hereby grant, bargain, sell and demise unto the said Lord *George Augustus Cavendish*, his executors, administrators, and assigns, such proportion of the tolls arising by virtue of the said Act as the sum of £200 doth or shall bear to the whole sum advanced or to be advanced on the credit of the said tolls; to be had or holden from the day of the date of these presents for and during the continuance of the said Act, unless the said sum of

NORTH, J. 1883 CAVENDISH v. CAVENDISH.

£200 with lawful interest for the same shall be sooner paid and satisfied."

The second mortgage was dated in September, 1836, and was in the following form:—"By virtue of an Act passed in the 3rd year of Geo. 4, entitled an Act to amend the general laws now in being for regulating turnpike roads in *England*, we whose hands and seals are hereunto subscribed, being five of the trustees or commissioners for putting into execution an Act passed in the 54th year of Geo. 3, entitled an Act for making and maintaining a road from *Lees*, in the parish of *Bingley*, to *Hebden Bridge*, both in the *West Riding* of the county of *York*, In consideration of the sum of £500 advanced and paid by the Right Honourable *William* Earl of *Burlington* to the treasurer of the said trustees or commissioners, do hereby grant and assign unto the said *William* Earl of *Burlington*, and to his executors, administrators, and assigns, such proportion of the tolls arising and to arise on the said turnpike road, and the toll-gates and toll-houses erected or to be erected for collecting the same, as the said sum of £500 doth or shall bear to the whole sum now or hereafter to become due and owing on the security thereof, To have, hold, receive, and take the said proportion of the said tolls, toll-gates, toll-houses and premises, with the appurtenances, unto the said *William* Earl of *Burlington*, and to his executors, administrators, and assigns, for and during the continuance of the term for which the said tolls are granted by the said last mentioned Act, unless the said sum of £500 with interest after the rate of 5 per cent. per annum shall be sooner repaid and satisfied."

The third mortgage was dated in May, 1844, by virtue of an Act passed in the 58th year of Geo. 3, for making a turnpike road from *Ulverstone* to *Lancaster*, and was in the same form as the mortgage of 1818, and assigned the tolls only and not the toll-houses.

H. A. Giffard, Q.C., and *Bailey*, for the Plaintiff:—

We submit that these assignments of turnpike tolls are not mortgages upon real securities. They are only secured upon the profits derived from the tolls taken at the toll-gates. This question was dealt with in the case of *Knapp* v. *Williams* (1). The receipts

(1) 4 Ves. 430, n.

from toll-gates are of the same nature as receipts of fares by a railway company, and it was held in *Attree* v. *Hawe* (1) that debenture stock of a railway did not give the holder of such stock an interest in land within the *Mortmain Act*, and might therefore be given by will for charitable purposes. Again, a mortgage of tolls may be considered in the same light as money borrowed upon rates, and we find that in *Jacson* v. *Governors of Queen Anne's Bounty* (2) where money was borrowed by justices of the peace, and charged by them by a bond upon the police rates of a county, that this was to be considered pure personalty; and in *Jervis* v. *Lawrence* (3) Vice-Chancellor *Bacon* held that an assignment by way of mortgage of a proportion of the rates arising under the *Metropolis Local Management Act*, 1855, to secure the repayment of a sum advanced by the assignee, did not create an interest in land within the meaning of the *Mortmain Act*. We therefore contend that these bonds or mortgages are not within the exception in the will.

Cozens-Hardy, Q.C., and *Simmonds*, for the persons entitled to the residue:—

These bonds are not mere mortgages of tolls taken at the gates; one of them includes the toll-houses, which are certainly real securities, and it must be considered that the other assignments were intended to include the toll-houses, as in all the cases power was given by the Act of Parliament under which the mortgages were made to charge the toll-houses as well as the tolls; besides which, the soil of the road is vested in the adjoining owner, and the securities are mortgages of the turnpike roads and toll-houses as well as the tolls taken at the gates. In the case of *Attree* v. *Hawe* there is no allusion to toll-houses. A mortgage of rates can have no bearing upon turnpike tolls and toll-houses. In *Robinson* v. *Robinson* (4) it was held (overruling a decision of Lord *Langdale* (5)) that turnpike road bonds secured by a mortgage or charge on tolls and toll-houses were real estate.

(1) 9 Ch. D. 337.
(2) 15 Ch. D. 561.
(3) 22 Ch. D. 202.
(4) 1 D. M. & G. 247.
(5) 11 Beav. 371.

NORTH, J.
1883
CAVENDISH v. CAVENDISH.

Everitt, Q.C., and *Bardswell*, for other parties.

Giffard, in reply.

NORTH, J.:—

A good deal of the argument has turned upon the decisions on what I may call for shortness the *Mortmain Act*. I do not think that is applicable entirely, for this reason. Under the Act of 9 Geo. 2, c. 36, what is provided is this: The object of the Act was to prevent the gift or alienation of lands or tenements to certain persons so as to cause the collection of land in the hands of those persons, where it remained when it once got there, and therefore tended to prevent the alienation of land, which was a thing to be avoided. Now alienation of land is one thing, and giving or lending money advanced on the security of land is another, and *primâ facie* the latter would seem not to be within the meaning of the *Mortmain Act* at all; but the Court said you must look at the purposes for which it was passed, that is, to prevent land getting into mortmain, and for that purpose you must see that it applies not only to a direct conveyance of the land but also to other dispositions that would bring land within it, as by giving money invested on mortgage, which would lead to the person to whom the money was given, getting the land itself. In later years it has been seen that there are many dispositions which ought not to be held void when found to be made in favour of a charity, because it is obvious that even if there is an interest in land indirectly, it is clear that the person to whom the benefit is given cannot possibly, by means of it, acquire an interest in land. Take for instance the case of a person who is interested in shares in a joint stock company. Although the corporation of which he is a member has an interest in land, yet it seems clear that the interest of the members of that company is not an interest in land, and therefore their interest in a company of that sort is not a thing they are prevented from disposing of in favour of a charity.

But then it is said that the old case of *Knapp* v. *Williams* (1) and others which were mentioned, shew that this turnpike toll is

(1) 4 Ves. 430, n.

not such as could be given in favour of a charity, and the observations of Lord Justice *James* on that point have been quoted. I do not think what he said has been fully stated, and therefore I will refer to it. In the case of *Attree* v. *Hawe* (1) he says: "It is possible to conceive the case of a company, the owner of a market, a port, or other franchise, with nothing to do but to receive tolls and pay its creditors, just as in the case of a turnpike or bridge the whole tolls may be taken by the creditors, leaving the road or bridge to be repaired by the parish or county." Then he goes on to say this: "But with a railway company this is impossible." Then he gives his reasons. He says: "The actual tolls taken, whether from other carriers or from freighters, or passengers, must, from the very nature of the case, remain under the dominion of the directors, to enable them to do what is required for the preservation of the road and the safety of life and property. The only thing really chargeable is the net earnings of the company, the same fund out of which, if sufficient, the dividends and interest of the other stockholders are to be paid. Again, there is by the Act a special machinery for the summary appointment of a receiver; but, without that special machinery, a person having a charge on the net earnings of such a body could have got a receiver of those net earnings, if the managing body were to disregard its duty of applying them exclusively to the payment of the debenture stock interest. I apprehend that, even with regard to preference shares, properly so-called, if the directors, acting in the interest of a majority of ordinary shareholders, were to misapply or not to apply such net earnings, the Court would have no difficulty in appointing a receiver to receive and properly apply the same." All those later observations as regards the position of persons interested in railway companies and the receiver of a railway company seem to me to apply exactly to the position of these turnpike bodies, because the funds are devoted to purposes by the express terms of the Act exactly similar to those which by the observations of Lord Justice *James* it was shewn the funds of a railway company were devoted. Following *Attree* v. *Hawe*, if the question was whether the bonds could properly be given in

(1) 9 Ch. D. 350.

NORTH, J. 1883 CAVENDISH v. CAVENDISH.

charity, I should be disposed to think that they might, but I do not think that is the question I have to consider here. The question is really the construction of those very few words—what is meant by the exception of a mortgage on real and leasehold security, the gift being of all testator's moneys and other securities for money, except mortgages on real and leasehold security. Those are taken out of this gift. The effect of that is exactly the same as if they were expressly given to somebody else instead of being left to go into the residue. Supposing the words had been except mortgages on real and leasehold security which I except from this gift and give to somebody else, the construction would be exactly the same. The question is what the exception in this case means. It seems to me it does include these interests, and I think they are mortgages on real or leasehold security. Looking at the words, as to one it is quite clear it is so to some extent, because it is a mortgage upon the toll-houses. Toll-houses, at any rate, would be real or leasehold security if only held for the term of the continuance of the roads, and so far as that goes it would be clearly within the exact words. Is there any difference between the two mortgages which do not contain a mortgage of the toll-house and one mortgage which does? My first impression was that the form of mortgage covered the toll-houses too. But I am not satisfied that that is so. The form is given as an assignment of tolls, and I do not see how it could be well extended to an assignment of such proportion of the toll-houses as the money advanced by this lender bore to the rest of the money advanced, and if it was intended to include the toll-houses, the words "toll-houses" should have been added, and would have been added in the security. And although the Act says that an assignment shall be in the words or to the effect following, I think it means that if toll-houses had been intended to be included toll-houses would have been mentioned. I do not think this question turns upon that. I cannot draw any distinction between these three mortgages upon the ground that one is real security, because the toll-houses are mentioned, and the others are not, because they are not mentioned. My own view is that they are real securities even without the toll-houses being mentioned,

and I think that the judgment in *Robinson* v. *Robinson* (1) supports my own view. That is an authority which I must follow. Therefore it seems to me that these securities are within the exception.

Solicitors: *Bailey, Shaw, Smith, & Bailey*; *Jaques, Layton, & Jaques*; *J. Payne.*

T. W. G.

In re HUMPHRIES.
SMITH *v.* MILLIDGE.

[1880 H. 2003.]

Will—Construction—"Children"—Illegitimate Child—Gift to Children of deceased Person.

A testatrix bequeathed to *A.*, "the eldest daughter of my deceased daughter *S.*, my gold watch." And she bequeathed other property to trustees "in trust for such of the children of my said deceased daughter *S.* who shall attain twenty-one, absolutely, equally share and share alike, the shares of such of them as shall be daughters to be for their sole and separate use." *S.* had two legitimate children, a son and a daughter, and she had also an illegitimate daughter, who was the person spoken of in the will as "*A.*, the eldest daughter of *S.*" :—

Held, that there was a sufficient indication of an intention that *A.* should be included in the description of "the children of *S.*"

FURTHER CONSIDERATION.

This action was brought for the administration of the real and personal estate of *Mary Ann Humphries*, widow, who died on the 29th of May, 1879.

She, by her will, dated the 4th of January, 1879, bequeathed "to *Annie Gertrude*, the eldest daughter of my deceased daughter *Sarah Ann Smith*, my gold watch and pearl brooch." And, after making other specific and pecuniary bequests, the testatrix devised and bequeathed all the residue of her real and personal estate to two trustees, of whom the Defendant was one, on the trusts thereinafter declared thereof, viz. as to a sum of £800, some furniture, and two freehold houses, upon trust to receive the rents

(1) 1 D. M. & G. 247.

NORTH, J.
1883
In re HUMPHRIES. SMITH *v.* MILLIDGE.

and income of the last-mentioned trust premises "until the youngest child of my said deceased daughter *Sarah Ann Smith* shall attain the age of twenty-one years, and to pay and apply the same for the maintenance and education of the children of my said deceased daughter, and when and so soon as the youngest of such children shall attain the age of twenty-one years the said trust premises shall be in trust for such of the children of my said deceased daughter *Sarah Ann Smith* as shall attain the age of twenty-one years, absolutely, equally share and share alike, the shares of such of them as shall be daughters to be for their sole and separate use."

The will contained other similar gifts to the children of other persons, and in each case the words were added, "the shares of such of the said children as shall be daughters to be for their sole and separate use." The testatrix appointed the two persons who were named as trustees to be also executors of the will. The Defendant alone proved the will; the other trustee and executor renounced probate and had never acted in the trusts of the will.

The testatrix's deceased daughter, *Sarah Ann Smith*, had had three children and no more,—viz. two daughters and a son. The eldest daughter, *Annie Gertrude* (who had attained twenty-one, and had married a Mr. *Horsfall*) was illegitimate; the other two children (the Plaintiffs in the action) were legitimate.

The main question to be determined on the present occasion was whether Mrs. *Horsfall* was included in the bequest to the children of the deceased daughter *Sarah Ann Smith*.

F. A. Lewin, for the Plaintiffs.—

The proper meaning of the word "children" is legitimate children only, and there is not in this will a sufficient indication of an intention that the illegitimate daughter *Annie Gertrude* should take as one of the children of *Sarah Ann Smith*: *Cartwright* v. *Vawdry* (1); *Megson* v. *Hindle* (2); *Bagley* v. *Mollard* (3).

[NORTH, J., referred to *Gill* v. *Shelley* (4).]

(1) 5 Ves. 530.
(2) 15 Ch. D. 198.
(3) 1 Russ. & My. 581.
(4) 2 Russ. & My. 336.

S. Dickinson, for the illegitimate child :—

Hill v. *Crook* (1) is directly in point. It is clear that the illegitimate child was intended to take. The reference to "daughters" is sufficient to shew that. The mother being dead, there could not be "daughters" unless *Annie Gertrude* was counted as a "daughter." Moreover she is in the previous gift to her expressly described as "the eldest daughter of my deceased daughter": *Gill* v. *Shelley* (2); *Theobald* on Wills (3).

Borthwick, for other parties.

Lewin, in reply.

Aug. 4. NORTH, J. (after stating the facts), continued :—

The question is whether *Annie Gertrude Smith*, who is illegitimate, can take under the description of "the children of my deceased daughter *Sarah Ann Smith*." The law on the point is quite settled by *Hill* v. *Crook* and *Dorin* v. *Dorin* (4). Nothing can be more clear than the way in which Lord *Cairns* states it in his judgment in *Hill* v. *Crook* (5). He says: "The principle which may fairly be extracted from the cases upon this subject is this,—the term 'children' in a will *primâ facie* means legitimate children, and, if there is nothing more in the will, the circumstance that the person whose children are referred to has illegitimate children will not entitle those illegitimate children to take. But there are two classes of cases in which that *primâ facie* interpretation is departed from. One class of cases is where it is impossible from the circumstances of the parties that any legitimate children could take under the bequest. A familiar example of that might be given in this way:—Suppose there is a bequest 'to the children of my daughter *Jane*,' *Jane* being dead, and having left illegitimate children, but having left no legitimate children. There, inasmuch as the testator must be taken to have known the state of his family, and must be taken to have intended to benefit some children of his daughter *Jane*,

(1) Law Rep. 6 H. L. 265.
(2) 2 Russ. & My. 336.
(3) 2nd Ed. p. 228.
(4) Law Rep. 7 H. L. 568.
(5) Law Rep. 6 H. L. 282.

NORTH, J. 1883 *In re* HUMPHRIES. SMITH *v.* MILLIDGE.

and inasmuch as she had no children who could be benefited except illegitimate children, rather than that the bequest should fail altogether the Courts will hold that those illegitimate children are intended, and they will take under the term 'children' . . . . The other class of cases is of this kind. Where there is upon the face of the will itself, and upon a just and proper construction and interpretation of the words used in it, an expression of the intention of the testator to use the term 'children' not merely according to its *primâ facie* meaning of legitimate children, but according to a meaning which will apply to, and which will include, illegitimate children." The case of *Megson* v. *Hindle* (1) has been referred to in the argument before me. There the testator gave "to my grandson *James*, the son of my daughter *Alice Jane*, the sum of £500," to be paid to him if and when he should attain twenty-one. But, in case he should die under twenty-one, the testator directed that the £500 should go in augmentation of the legacy of £2000 thereinafter bequeathed "upon trust in favour of the children and issue of my said daughter *Alice Jane*." The testator then devised certain messuages to trustees on trust to pay the rents and profits to his said daughter *Alice Jane*, the wife of *William Mitchell*, during her life, and at her death in trust for the children or remoter issue of *Alice Jane* as she should by will appoint, and in default of such appointment, and subject thereto, in trust for the child, if only one, or all the children, if more than one, of his said daughter *Alice Jane* who either before or after her decease should, being a son or sons, attain twenty-one, or being a daughter or daughters, should attain that age or marry, such children, if more than one, to take in equal shares as tenants in common. The testator then gave £2000 to his trustees to be accumulated till the expiration of twenty-one years from the time of his death, or till the death of *Alice Jane*, whichever should first happen, and then directed the fund and its accumulations to be divided amongst all the children of *Alice Jane* who should be living at the period of distribution, and the issue of such of them as should then be dead. The grandson *James* was illegitimate. He attained twenty-one and survived his mother. It was held by *Jessel*, M.R., and by the

(1) 15 Ch. D. 198.

Court of Appeal that he was not entitled to share in the gifts to the children of *Alice Jane*. *Jessel*, M.R., in his judgment referred, with approval, to *Bagley* v. *Mollard* (1). And Lord Justice *James*, said (2): "I do not see my way to differ from the Master of the Rolls. The testator makes a special and distinct provision for *James Mitchell*, which appears to me inconsistent with an intention to include him in the general gift to *Alice Jane's* children. If I were asked what the testator really meant, I should say he did not intend to include *James Mitchell* in the gifts to *Alice Jane's* children; and, that being so, it is impossible for me to come to the conclusion that there is such a context as to take the case out of the rule that 'children' *primâ facie* means legitimate children." And *Cotton*, L.J., said (3): "To take a case out of the common rule that only legitimate children can take under a gift to 'children,' there must be on the face of the will such a strong probability of the testator's intending to include illegitimate children, that a contrary intention cannot be imputed to him. Now, it struck me at first as improbable that the testator intended to include *James Mitchell* in the gift to children, when he makes a separate provision for him, which on his death under twenty-one is to fall into the £2000 given to the children. Still, if a necessary inference that he was to take as a child can be collected from the will, he ought not to be excluded," and then the Lord Justice points out that the testator did not refer to *James Mitchell* in the same terms as the other children of *Alice Jane*, but spoke of him as "my grandson *James*, son of my daughter, a mode of description which would be more natural in the case of an illegitimate than of a legitimate child." And Lord Justice *Thesiger* said: "In order to enable illegitimate children to take under a gift to children, there must be a plain and clear inference from the terms of the will leaving no doubt that they were intended to take; and I cannot find such plain and clear inference in this case." Upon that case two observations may be made. In the first place, the gift was to the children of a living person. That is clear, because a life estate is given to the daughter *Alice Jane*, though it is singular that this circumstance

(1) 1 Russ. & My. 581. (2) 15 Ch. D. 205.
(3) 15 Ch. D. 205, 206.

NORTH, J. 1883 *In re* HUMPHRIES. SMITH *v.* MILLIDGE.

is not referred to either in the arguments or in the judgments. Again, even in that case both Lord Justice *James* and Lord Justice *Cotton* relied on the fact that another provision was made for *James Mitchell*, which was to fall into the £2000 in case he should not attain twenty-one.

In the present case then I have to see whether there is anything in the will on its fair construction which shews that the granddaughter *Annie Gertrude* was intended to take under the gift to "the children of my deceased daughter *Sarah Ann Smith*." Now the very first gift in the will is of a gold watch and pearl brooch to *Annie Gertrude*, and there she is described as "the eldest daughter of my deceased daughter *Sarah Ann Smith*." Then comes the gift of the £800 and the freehold houses to trustees "in trust for such of the children of my deceased daughter *Sarah Ann Smith* as shall attain the age of twenty-one years, absolutely, equally share and share alike." Stopping there, the words of the gift would be satisfied by giving the subject-matter of it to the two legitimate children of the daughter, because they were both living at the date of the will, and they answered to the description. And, though the testatrix had in the previous gift of the gold watch described the child *Annie Gertrude* as "the eldest daughter of my deceased daughter," I think both *Bagley* v. *Mollard* (1) and *Megson* v. *Hindle* (2) are sufficient to shew that I could not for that reason alone hold that she was intended to be included under the description of "children" of the daughter *Sarah Ann Smith*. But then come these additional words, "the shares of such of them as shall be daughters to be for their sole and separate use." What light does this throw upon the matter? It seems to me to shew that the word "children" was intended to include daughters; it is an adoption of the fact that the word "children" would include daughters; and it would be impossible that daughters could take unless the illegitimate child does take, for otherwise there would be only one daughter. The case most like the present is *Edmunds* v. *Fessey* (3). There the testator bequeathed £100 a piece to each of the sons and daughters of his deceased cousin *Thomas*

(1) 1 Russ. & My. 581. (2) 15 Ch. D. 198
(3) 29 Beav. 233, 234.

Holyoake living at his own death. There were living at the testator's death three sons and one daughter of the cousin, the daughter and one of the sons being illegitimate, and Lord *Romilly*, M.R., held that the illegitimate daughter was entitled, but that the illegitimate son was not. Lord *Romilly* said: "There are sufficient persons alive to satisfy the word 'sons,' for *Thomas Holyoake* had two legitimate sons. It is, therefore, impossible to say that illegitimate sons are let in by these words. But he had no legitimate daughter, and I do not see how it is possible to exclude the illegitimate daughter, and though the word is 'daughters' in the plural, it does not alter the case. It is a gift to the legitimate sons and to the only daughter. . . . I have no doubt of the intention of the testator to include all, but the rule of interpretation is too strong; it is impossible to include legitimate and illegitimate sons together, unless the latter are in some way distinctly pointed out." The present case appears to me to fall within both of the two classes of cases which are mentioned by Lord *Cairns* in *Hill* v. *Crook* (1). It seems to me impossible that legitimate children only can take, and on the construction of the will as a whole the word "children" appears to be used in a larger sense than its *primâ facie* sense of legitimate children. It is said that I ought to reject the final clause of the gift in which the reference is made to daughters, because it is a common form, and therefore I ought not to pay any attention to it. A similar clause is to be found in several other places in the will, and it is said that it is rather the language of the gentleman who drew the will than of the testatrix herself. There are some observations of Vice-Chancellor *Malins* on this point in *Ellis* v. *Houstoun* (2). He says (3): "It is suggested that I am not to read this will as I find it; that the will was not prepared by the testatrix, but by somebody else, and that therefore I am to hear what that somebody else says was the intention of the testatrix, instead of looking at the will itself. The law is so clear that it does not admit of any such contention. I must look at the will itself; I cannot go from the words which are used in the will. We can never go behind a will to construe it. The words to be found in the will,

(1) Law Rep. 6 H. L. 282.
(2) 10 Ch. D. 236.
(3) 10 Ch. D. 242.

NORTH, J. 1883 *In re* HUMPHRIES. SMITH *v.* MILLIDGE.

whoever prepared it, became the words of the testatrix as soon as she executed the will." It is hardly necessary to refer to any authority on this point, but these words of the Vice-Chancellor are so very apposite that I have thought it as well to read them. In the present case there is this special reason for referring to the clause in the gift which speaks of daughters, in that *Annie Gertrude* has been already described as "the eldest daughter of my deceased daughter." Why after that I should reject the clause which speaks of "the shares of such of them as shall be daughters," I am unable to see. Looking at the whole will, I am of opinion, for the reasons which I have stated, that it was the intention of the testatrix that the illegitimate daughter *Annie Gertrude* should take under the gift to the children of *Sarah Ann Smith*, and I shall make a declaration to that effect. Evidence has been adduced to shew that the testatrix treated this child as if she had been a legitimate child of her daughter, though she knew that she was illegitimate. I have put that evidence aside in construing the will, and I only refer to it now for the purpose of saying that I am glad to find that it is in accordance with the view which I have taken of the will.

Solicitors: *Lewin & Co.; Wilkinson & Drew.*

W. L. C.

NORTH, J. 1883 *Aug.* 4.

In re WALKER AND HUGHES' CONTRACT.

[1883 W. 2748.]

Power of appointing New Trustees—Trustee remaining Abroad for more than Twelve Months—Person to exercise Power—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 31—*Settlement executed before Act.*

A settlement executed in 1878 contained no express power to appoint new trustees, but there was a declaration that the husband and wife during their joint lives, and the survivor of them during his or her life, "shall have power to appoint new trustees or a new trustee for this settlement." There was no express reference to the power of appointing new trustees conferred by sect. 27 of *Lord Cranworth's Act*, which was then in force:—

Held, that after the commencement of the *Conveyancing Act*, 1881, the husband and wife were the proper persons to exercise the power conferred

by sect. 31 of that Act of appointing a new trustee in place of one of the trustees who had remained out of the *United Kingdom* for more than twelve months, though sect. 27 of *Lord Cranworth's Act* did not provide for, and the parties when they executed the settlement probably did not contemplate, the occurrence of a vacancy in that event.

ADJOURNED SUMMONS.

This was a summons under the *Vendor and Purchaser Act*, 1874.

On the 18th of June, 1883, an agreement was entered into between *William Walker* and *François Heron*, of the one part, and *Charlotte Hughes*, *Eliza Hughes*, and *Georgiana Hughes*, of the other part, for the sale by the former to the latter of a leasehold house at *Richmond*. The agreement stated that the vendors were trustees selling under a power of sale in a settlement.

The abstract of title delivered by the vendors to the purchasers shewed that the lease of the house in question, together with other property, was by an indenture dated the 29th of August, 1878, assigned by *M. F. C. Turpin* and *Clara Ellen*, his wife, to *William Walker* and *Frederick Reading*, their executors, administrators, and assigns, for the residue then to come of the term of years for which the lease was granted, To hold the same upon certain trusts therein declared, being trusts for the separate use of the wife during the joint lives of the husband and wife, and for the survivor of them during his or her life, and after the death of the survivor upon trust to sell the trust property and to stand possessed of the proceeds of sale in trust for the child or children of the marriage. The deed contained a power for the trustees or trustee for the time being, with the consent of the husband and wife during their joint lives, to sell the trust property or any part thereof, and there was a declaration that the husband and wife during their joint lives, and the survivor of them during his or her life, "shall have power to appoint new trustees or a new trustee for this settlement."

In May, 1880, *F. Reading* left *England* for the *Cape of Good Hope*, and continued to reside out of the *United Kingdom* for more than twelve months.

By an indenture dated the 5th of May, 1883, and made between Mr. and Mrs. *Turpin* of the first part, *F. Heron* of the second part, and *William Walker* and *F. Heron* of the third part, and described

NORTH, J.
1883
In re WALKER AND HUGHES' CONTRACT.

as supplemental to the indenture of the 29th of August, 1878, and which was thereinafter called the principal indenture, after a recital that *Reading* had been resident out of the *United Kingdom* for more than twelve months, It was witnessed that Mr. and Mrs. *Turpin*, in exercise of the power for that purpose given to them by the principal indenture and of every other power enabling them in that behalf, did thereby appoint *Heron* to be a trustee of the principal indenture in the place of *Reading* and jointly with *Walker* for all the purposes of the principal indenture. And it was also witnessed that Mr. and Mrs. *Turpin*, with the consent of *Walker* and *Heron*, did thereby declare that all the estate and interest of *Walker* and *Reading* and each of them in the property subject to the trusts of the principal indenture should forthwith vest in *Walker* and *Heron* as trustees of the principal indenture, and as joint tenants, for the purposes and upon the trusts thereof.

The purchasers objected that this appointment of *Heron* as a trustee of the settlement was not properly made, for that Mr. and Mrs. *Turpin* were not, within the meaning of sect. 31 (1) of the *Conveyancing Act*, 1881, the persons nominated by the settlement for this purpose, and that the appointment ought to have been made by the continuing trustee. The vendors insisted that the appointment was properly made, and this summons was taken out by the purchasers, asking a declaration that a good title had not been shewn by the vendors in accordance with the contract.

Daw, for the purchasers :—

The question is, who ought to have exercised the power of

(1) Sect. 31 provides "(1.) Where a trustee, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of the *United Kingdom* for more than twelve months, or desires to be discharged from the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for this purpose by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the *United Kingdom*, desiring to be discharged, refusing or being unfit, or being incapable as aforesaid."

"(8.) This section applies to trusts created either before or after the commencement of this Act."

appointing a new trustee; whether the husband and wife were, within the meaning of sect. 31, the "persons nominated for this purpose by the instrument creating the trust;" or whether the appointment ought to have been made by the continuing trustee. When the settlement was executed *Lord Cranworth's Act* was in force, and the nomination of the husband and wife as the persons to appoint new trustees could only have had reference to the power of appointing new trustees conferred by sect. 27 of that Act, which does not contemplate the appointment of a new trustee in the event of a trustee remaining out of the *United Kingdom* for more than twelve months. The husband and wife were not nominated for the purpose of appointing new trustees in that event, which, at the time when the settlement was executed, would not create a vacancy among the trustees. The vacancy, to fill which the appointment was made in May, 1883, occurred only by virtue of sect. 31 of the *Conveyancing Act*, and such a vacancy could not have been in the contemplation of the parties when the settlement was executed in 1878. The appointment should, therefore, have been made by the continuing trustee. If the appointment was not properly made the property has not vested under sect. 34 in the continuing trustee and the new trustee, and this is important to the purchasers.

W. E. Mozley, for the vendors:—

The nomination of the husband and wife by the settlement is not confined to an appointment of new trustees under the power conferred by *Lord Cranworth's Act;* it will extend to any such power conferred by any subsequent Act. The words are perfectly general. And the words of sect. 31, "nominated for this purpose," mean simply nominated for the purpose of appointing new trustees. They are as large as possible.

Daw, in reply:—

Powers are always construed strictly.

NORTH, J.:—

I think that the husband and wife are "the persons nominated for this purpose" within the meaning of sect. 31. Though the

NORTH, J.
1883
In re WALKER AND HUGHES' CONTRACT.

settlement does not say in what events they are to have the power of appointing new trustees, I think it means that they are to have the power whenever a vacancy shall occur among the trustees. No doubt the parties were thinking of the vacancies which might occur under *Lord Cranworth's Act*, but the words are not confined to that. The intention was that whenever there should be a vacancy to be filled the husband and wife during their joint lives should have the power of filling it. Then came the *Conveyancing Act* of 1881, by which sect. 27 of *Lord Cranworth's Act* was repealed, and it is clear to me that the intention was to substitute the power conferred by sect. 31 for that which was conferred by sect. 27 of *Lord Cranworth's Act*. Sect. 31 enacts that the happening of certain events shall create vacancies among trustees, which vacancies may be filled up "by the person or persons nominated for this purpose by the instrument creating the trust." It seems to me that the husband and wife are in the present case "the persons nominated for this purpose," because they are nominated for the purpose of filling any vacancy among the trustees. I think the intention of sect. 31 was that whenever a person had been nominated by the instrument creating the trust as the person to appoint new trustees, he should be the person who should have the power of filling up any vacancy occurring under the provisions of sect. 31.

Solicitors for purchasers: *Coode, Kingdon, & Cotton.*
Solicitor for vendors: *C. C. Shorto.*

W. L. C.

In re LESINGHAM'S TRUSTS.

NORTH, J.

1883

Aug. 6.

Will—Construction—"Sole and Unmarried."

A testatrix, by her will made in 1860, bequeathed a fund to trustees, on trust to pay the income to her husband for his life, and on his death to divide the fund into four equal parts, and, as to one of the parts, "upon trust to pay the same to *J. H.*, spinster, if she be then sole and unmarried, but, if she be then married," the testatrix directed her trustees to pay the income of the fourth part to *J. H.* for her life, for her separate use, and after her death to hold it on trust for her children. In June, 1878, the testatrix died, and her husband died in April, 1883. In April, 1861, *J. H.* married, and in November, 1878, a decree absolute was made for the dissolution of her marriage. There were three children of the marriage. *J. H.* did not marry again:—

Held, that the words "then sole and unmarried" meant "not having a husband" at the time of the death of the tenant for life, and that, in the events which had happened, *J. H.* was absolutely entitled to the one-fourth share.

PETITION.

Jemima Maria Lesingham, by her will, dated the 24th of July, 1860, in exercise of certain powers of appointment which were vested in her, appointed certain funds to her trustees and executors, upon trust to pay the annual income to her husband for his life, and upon his decease upon trust to pay certain legacies therein mentioned, and after the payment thereof upon trust to divide the residue of the trust fund into four equal parts; and as to one such part to pay the same to *R. D. Hughes;* as to another such part to pay the same to the trustees or trustee for the time being of an indenture of settlement therein mentioned; as to another such part to retain the same upon trust to invest the same, and to pay the annual income thereof to *Lydia Waters Dudfield*, the wife of *T. O. Dudfield*, during her life, for her sole and separate use without power of anticipation, and after her death to stand possessed of the capital and income of the said last-mentioned one-fourth part, in trust for such child or children of the said *Lydia Waters Dudfield* by her then present or any future husband as, being a son or sons, should attain the age of twenty-one years, or, being a daughter or daughters, should attain that age or marry under that age, if more than one in

NORTH, J. 1883 *In re* LESINGHAM'S TRUSTS.

equal shares, and if only one the whole for such one; and in case there should be no child of the said *Lydia Waters Dudfield* who, being a son, should attain the age of twenty-one years, or who, being a daughter, should attain that age or marry under that age, then in trust for such person or persons as the said *Lydia Waters Dudfield* should, whether covert or sole, by will appoint, and, in default of appointment, in trust for the person or persons who, at the time of the decease of the said *Lydia Waters Dudfield* would be entitled to her personal estate in case she had then died intestate and without leaving a husband, in the like shares and proportions as such persons (if more than one) would be entitled thereto under the *Statutes of Distribution*. And as to the remaining one-fourth part "upon trust to pay the same unto *Julia Hannah Hughes*, spinster, if she be then sole and unmarried, for her own benefit absolutely; but if she be then married" then the testatrix directed her trustees to retain the same, upon trust for investment as therein mentioned, and to stand possessed of the securities on which the same should be invested and of the annual income thereof upon such and the like trusts for the benefit of the said *Julia Hannah Hughes*, her children, appointees, and next of kin respectively, as were thereinbefore expressed of and concerning the one equal fourth part given in trust for *Lydia Waters Dudfield*, her children, appointees, and next of kin respectively.

The testatrix died on the 2nd of June, 1878, and her husband died in April, 1883. On the 3rd of April, 1861, *Julia Hannah Hughes* married *H. M. Nepean*. There were three children of the marriage; the eldest, a daughter, attained twenty-one on the 22nd of February, 1883; the other two were, when this petition was heard, still infants. The eldest daughter was unmarried. On the 27th of February, 1878, a decree *nisi* was pronounced for the dissolution of the marriage of Mr. and Mrs. *Nepean*, and on the 12th of November, 1878, the decree was made absolute. The trustees of the will of the testatrix were about to divide the trust fund into four equal parts, and Mrs. *Nepean* claimed to be entitled absolutely to one of the parts as having been "sole and unmarried" at the time of the death of the husband of the testatrix. This claim was disputed by Mrs. *Nepean's* eldest daughter on behalf of herself and the two infant children. The trustee

presented this petition, under the Act 22 & 23 Vict. c. 35, asking the opinion of the Court whether they would be justified in transfering one-fourth part of the trust fund to Mrs. *Nepean*.

E. S. Ford, for the Petitioners.

Everitt, Q.C., for Mrs. *Nepean*:—

The words "sole and unmarried" mean "not under coverture," and Mrs. *Nepean* answered to this description at the time of the death of the tenant for life. The decree for a divorce had been made absolute before that time. The word "unmarried" is no doubt a word of flexible meaning, and though it is sometimes construed "never having been married," it may mean being without a husband at a specified time: *Clarke* v. *Colls* (1); but here there is also the word "sole," which simply means "discovert," and the Court will give effect to the plain intention, which was that Mrs. *Nepean* should take an absolute interest in the events which have happened.

Glasse, Q.C., for the eldest daughter of Mrs. *Nepean*:—

Though "unmarried" is a word of flexible meaning, yet its ordinary or primary meaning is "never having been married": *Dalrymple* v. *Hall* (2); *Heywood* v. *Heywood* (3).

[NORTH, J., referred to *Jarman* on Wills (4).]

Here the intention was that if there were issue the mother should only have a life interest, and that the issue should take the fund after her death.

[NORTH, J.:—She might have survived the tenant for life and have married after his death.]

A divorce was not in the contemplation of the testatrix. The prevailing intention was to provide for the issue if there should be any.

NORTH, J.:—

I do not feel any doubt as to the meaning of this gift. The word "unmarried" is, no doubt, one of flexible meaning. It may

(1) 9 H. L. C. 601.
(2) 16 Ch. D. 715.
(3) 29 Beav. 9.
(4) 4th Ed. vol. i. p. 522.

NORTH, J.
1883
In re LESINGHAM'S TRUSTS.

mean here either "never having had a husband," or "not having a husband at the time of the death of the tenant for life." The question is, which of these is the true meaning? The words are "upon trust to pay the same unto *Julia Hannah Hughes*, if she be then sole and unmarried, for her own benefit absolutely; but, if she be then married," upon trust for her for her life, with remainder to her children. Mr. *Glasse* says the scheme of the will is, that if *Julia Hughes* should marry and have children the children are to take after her death. I do not see that this is so. If she had been a spinster at the time of the death of the tenant for life and had married afterwards, there would have been no provision for her children. The will, therefore, does not make a provision for her children in every possible event. The words "then sole and unmarried" seem to me to indicate a person who is then what is popularly called "sole," that is, not then having a husband. I do not see how a widow could be properly described as "then married." I think the words all point to an intention that, if the legatee is then free from the control of a husband, she is to be able to dispose of the fund as she pleases. I think it probable that the event which has actually happened was not in the contemplation of the testatrix, but the words which she has used are sufficient to include it. I think they mean "not having a husband" at the time referred to, whether the legatee had never had a husband, or whether she had lost him by death or by divorce. I am therefore of opinion that the absolute gift has taken effect.

Solicitors: *Warry, Robins, & Burges; Hughes & Beadles.*

W. L. C.

WOLVERHAMPTON AND STAFFORDSHIRE BANKING COMPANY *v.* GEORGE.

NORTH, J.

1883

Aug. 6, 8.

[1883 W. 1670.]

Practice—Mortgage—Foreclosure Action—Immediate Foreclosure Judgment Absolute against Infant.

Judgment for an immediate foreclosure absolute against an infant granted, the Plaintiffs offering to pay the Defendant's costs of the action as between solicitor and client, and the Defendant's counsel not asking for liberty to redeem, or that an account should be taken of what was due to the Plaintiffs, upon the Court being satisfied by evidence that the value of the property was not sufficient to pay the amount of the principal sum due on the mortgage, together with interest and the costs of the action, and that it would be for the benefit of the infant to give judgment in that form.

THIS was an action for the foreclosure of a mortgage of real estate. The mortgagor was dead, and the Defendant, who was his heir-at-law, was an infant. There was evidence that the value of the property was £1025, and that the amount due on the mortgage was £976, in addition to interest thereon at 5 per cent. per annum from the 31st of December, 1882, and the costs of the action.

Manby, for the Plaintiffs, moved for judgment in default of pleading, and asked for a judgment for immediate foreclosure absolute, the Plaintiffs being willing to pay the Defendant's costs of the action as between solicitor and client, according to the form given in *Seton* on Decrees (1); *Croxon* v. *Lever* (2); *Bennett* v. *Harfoot* (3).

Ryland, for the Defendant, did not ask for liberty to redeem, or that an account should be taken of what was due to the Plaintiffs.

NORTH, J., said that an affidavit must be made by the guardian of the infant stating that in his opinion it would be for the

(1) 4th Ed. vol. ii. pp. 711, 714.
(2) 12 W. R. 237.
(3) 19 W. R. 428.

NORTH, J.
1883
WOLVERHAMPTON AND STAFFORDSHIRE BANKING COMPANY v. GEORGE.

infant's benefit that the proposed order should be made, and shewing the grounds of his opinion. There must also be fuller evidence of the value of the property. The order asked for might then be made, but it would not be drawn up until this evidence was produced to the Court. The case might be mentioned to the vacation Judge, if necessary.

Solicitors for Plaintiffs: *Ullithorne, Currey, & Villiers*, agents for *Neve & Cresswell, Wolverhampton.*

Solicitors for Defendant: *Clarke, Woodcock, & Ryland*, agents for *H. Kitson, Wolverhampton.*

W. L. C.

In re ARCEDECKNE.
ATKINS *v.* ARCEDECKNE.

[1871 A. 87.]

PEARSON, J.

1883

April 23, 28; *May* 2.

Promissory Notes for Moneys borrowed—Principal and Surety—Action against one Surety—Payment of Debt—Policies effected on Life of Principal Debtor—Assignment of Policies after Assured's Death to Surety's Father who had paid the Premiums—Rights of Parties to Policy-moneys.

C. being indebted to *D.*, four of his friends joined him in signing and giving four promissory notes to secure the payment to *D.* of the sum of £13,000 and interest. *D.* effected three policies on the life of *C.* for, in the aggregate, £10,000.

In 1867, Lord *H. of E.*, one of the co-sureties, having been sued by *D.* on the notes, paid, with the assistance of his father, the Earl of *E.*, the £13,000 and interest by a mortgage of estates which were settled upon the Earl for life with remainder to Lord *H. of E.*; and the Earl having paid the premiums and kept the policies on foot, in September, 1871, shortly after the death of *C.* obtained an assignment from *D.* of the policies and received the £10,000 from the insurance office.

A. another of the four sureties died. His estate, which was stated to be insolvent, was being administered by the Court, and Lord *H. of E.* brought in a claim against it for contribution in respect of the sum paid to *D.* on the notes:—

Held, that, under all the circumstances of the case, Lord *H. of E.* and his father, the Earl, must be treated as one person, and that the claim for contribution would be allowed, but only after Lord *H. of E.* had brought into account, as a set-off, the moneys which were received on the three policies assigned to the Earl, credit being first given for the premiums and other moneys which had been paid in reference to the transaction.

THE action was for the administration of the estate of *Andrew Arcedeckne*, deceased, it being brought by a creditor against the executrix, the widow of the testator. It was stated that the estate was insolvent and that there would be only a small dividend.

The question which now came before the Court was in reference to a claim made in Chambers, and adjourned into Court, by Lord *Howard of Effingham*, against the estate of the testator.

In 1865, Lord *Howard of Effingham* (the eldest son of the Earl of *Effingham*), *Andrew Arcedeckne*, Lord *Vaughan* (the eldest son of the Earl of *Lisburne*, to whom he has since succeeded),

PEARSON, J. 1883 *In re* ARCEDECKNE. ATKINS *v.* ARCEDECKNE.

G. Brudenell Bruce, and the Hon. *Lucius Cary*, joined in four joint and several promissory notes, of which the last was dated the 31st of August, 1865, for the sum of £13,000 representing the sum of £10,000, which was lent to the Hon. *Lucius Cary* by *David John Davis*, and £3000 for interest and charges on renewals.

The notes were renewed from time to time, until the year 1867, when Lord *Howard of Effingham* was sued upon them, and in November of that year he paid the sum of £13,000 and £651 4*s.* 9*d.* interest, and also certain costs, and thereupon he brought an action against *Andrew Arcedeckne* in the Common Pleas to recover one third part of the sum, principal, interest, and costs, which he had paid *D. J. Davis*, viz., £14,301 4*s.* 9*d.* In January, 1867, those persons who were liable on the four promissory notes and on other notes made for the Hon. *Lucius Cary's* benefit, entered into an agreement which purported to equalize their liabilities severally to the holders of the notes, without reference to the sums of money for which they had irrespectively of the agreement made themselves liable; and *Andrew Arcedeckne* filed a bill in Chancery for the specific performance of the agreement and for an injunction to restrain the action against him in the Common Pleas. On a motion for an injunction being made before Vice-Chancellor Sir *Richard Malins* an undertaking was given on the part of the Plaintiff to allow judgment to be entered against him in the action to abide the result of the suit in Chancery.

The Lords Justices on appeal held that the agreement of 1867 was too uncertain to be specifically enforced, and dismissed the bill, and their decision was afterwards affirmed by the House of Lords.

The payment of the £13,000 and other sums in respect of the four promissory notes was effected by Lord *Howard of Effingham* with the assistance of his father the Earl of *Effingham*, by a mortgage of the estates which were settled upon the Earl of *Effingham* for his life with remainder to Lord *Howard of Effingham*.

D. J. Davis effected on the 14th of September, 1865, by way of further security, insurances on the life of the Hon. *Lucius Cary* for, in the aggregate, the sum of £10,000, and upon payment of the sum of £13,000 and other moneys due to him the

Earl of *Effingham* determined to keep on foot the policies of insurance, and he did so, but no assignment of the policies was made to him until after the death of the Hon. *Lucius Cary*, which happened on the 6th of August, 1871, and after that event, viz., on the 4th of October in that year, *D. J. Davis* executed an assignment of the policies to the Earl of *Effingham*, in consideration, it was stated, of the repayment by the Earl of the premiums which had been paid by *D. J. Davis* on the policies prior to the payment of the sum of £13,000 together with interest. The moneys payable on the policies were afterwards received by the Earl of *Effingham*.

The deed of the 4th of October, 1871, recited that whereas on the 14th of September, 1865, three policies of insurance on the life of the Hon. *Lucius W. C. A. F. Cary* were effected in the name of the said *D. J. Davis* with the *Law, Property, and Life Insurance Society* . . . . for the several sums of £2000, £5000, and £3000 respectively. And whereas the said several policies were effected in connection with and for securing moneys raised for and then owing by the said *L. W. C. A. F. Cary*, and for the payment of which the Hon. *H. Howard*, commonly called Lord *Howard of Effingham*, the eldest son of the Earl of *Effingham*, was a surety, and which moneys, to an amount exceeding £13,000, were, in the year 1867, paid by the said Lord *Howard of Effingham*, who had been sued for the same, and the said Earl of *Effingham* thereupon became beneficially entitled to the said policies, and he hath since paid the premiums for keeping up the same, and the said *L. W. C. A. F. Cary*, having lately departed this life, the said Earl of *Effingham* has requested the said *D. J. Davis* to assign the said policies to him in manner hereinafter mentioned, which he has agreed to do."

The assignment was then made, in the usual form, of the policies and all moneys payable thereunder to the Earl of *Effingham*, and he had in the year 1870 further insured the Hon. *Lucius Cary's* life for the sum of £1000.

The claim was made by Lord *Howard of Effingham* against the estate of *Andrew Arcedeckne*, on the ground that as a co-surety *Andrew Arcedeckne* was bound to contribute an aliquot part of the sum which Lord *Howard of Effingham* and his father, the Earl of

PEARSON, J. 1883 *In re* ARCEDECKNE. ATKINS *v.* ARCEDECKNE.

Effingham, had paid on account of the Hon. *Lucius Cary*, who, it appeared in evidence, was quite without the means to pay the sum owing on the four promissory notes.

Kekewich, Q.C., for Lord *Howard of Effingham*, stated the facts of the case.

Hastings, Q.C., and *E. Cutler*, for the Plaintiff, submitted that he was entitled to benefit by what the Earl of *Effingham* and Lord *Howard of Effingham* had received and done from and in reference to the policies. The question arose not as between principal and surety but as between co-sureties, and it was impossible that one co-surety could be allowed to retain the whole of the proceeds of a security which was originally obtained by the creditor in whose place he stood. If a co-surety obtained any security the other co-surety was entitled to the benefit of it, and could be called upon to contribute towards the common loss. The Earl of *Effingham* acknowledged by the recitals in the deed of assignment that the policies were "effected in connection with and for securing moneys raised for and then owing" by Mr. *Cary* —the debt which was paid off—and that was quite sufficient to shew that *Andrew Arcedeckne's* estate was entitled to any benefit which arose from the policies, and which the Plaintiff now claimed as against Lord *Howard of Effingham*.

They referred to *Steel* v. *Dixon* (1); *Newton* v. *Chorlton* (2); *Lake* v. *Brutton* (3); *Forbes* v. *Jackson* (4); *Pearl* v. *Deacon* (5); *Lea* v. *Hinton* (6); *Drysdale* v. *Piggott* (7); *Knox* v. *Turner* (8); *Miller* v. *Sawyer* (9); *Hall* v. *Robinson* (10).

[PEARSON, J., referred to *Bruce* v. *Garden* (11).]

E. Ford, for other Defendants.

Kekewich, Q.C., in reply, submitted that Lord *Howard of Effingham* could not be treated as bound by the Earl of *Effingham's*

(1) 17 Ch. D. 825.
(2) 10 Hare, 646.
(3) 8 D. M. & G. 440.
(4) 19 Ch. D. 615.
(5) 1 De G. & J. 461.
(6) 5 D. M. & G. 823.
(7) 8 D. M. & G. 546.
(8) Law Rep. 5 Ch. 515.
(9) 30 Vermont, 412.
(10) 8 Iredell, 56.
(11) Law Rep. 5 Ch. 32.

purchase of the policies, the Earl having voluntarily assisted his son and having purchased the policies for his own benefit and not for that of his son.

PEARSON, J. :—

The question in this case is, whether or not the moneys which have been received upon certain policies of insurance by the Earl *of Effingham* can be retained by him or by Lord *Howard of Effingham* for his own or their benefit, or whether or not these moneys should be brought into hotchpot as between Lord *Howard* of *Effingham* and the other persons, whose position I will describe, in taking the accounts between them.

The question arises in this way :—[His Lordship after stating the facts set forth above in reference to the five gentlemen having joined together in signing the four promissory notes, and giving them to *Davis* to secure the payment of a sum of £10,000 and interest, said :—] They all signed the promissory notes, and they all became jointly liable to *Davis* for the payment of them. On the 14th of September, 1865, *Davis* insured the life of Mr. *Cary* for £10,000 in three separate policies. In the year 1867, Lord *Howard of Effingham* was called upon to pay the promissory notes; and he did do so with the assistance of his father the Earl of *Effingham*, I mention the Earl's name here because it is impossible to exclude it from a statement of the facts, and for the purposes of my decision I shall consider Lord *Howard of Effingham* and the Earl of *Effingham* as one person. The case is one of contribution between the parties who were bound to pay the promissory notes, and either the Earl of *Effingham* stands in the same position as his son Lord *Howard of Effingham*, or these proceedings have nothing whatever to do with him. I repeat, therefore, that I treat the father and son (as they have been to a great extent treated in the argument) as if they were one person. I think I have nothing whatever to do with any contract which may have been made between Lord *Howard of Effingham* and his father with respect to raising the moneys which were required to pay off the promissory notes, and which were paid. I consider, whatever claim the Earl of *Effingham* may have, that he has no higher claim than Lord *Howard of Effingham* could

PEARSON, J.

1883

In re ARCEDECKNE. ATKINS *v.* ARCEDECKNE.

have who is represented before me. Upon the payment of the promissory notes an arrangement was made by Lord *Howard of Effingham* (I use his name) with *Davis* for the assignment of policies to him, and I assume, though it was not proved before me, but his counsel stated that it could be proved, that there was a considerable sum paid to *Davis* upon the assignment of the policies, independently of the amount due upon the promissory notes. Mr. *Cary* died in August, 1871. From 1867 down to the time of the death of Mr. *Cary*, the Earl of *Effingham* paid the premiums upon the policies which had been bought from *Davis*, and in 1870 he insured Mr. *Cary's* life for another £1000. The question now is this: *Andrew Arcedeckne's* estate is called upon to contribute his share of the moneys which were paid upon the promissory notes, and on behalf of his estate it was contended that Lord *Howard of Effingham* must bring into hotchpot the amount which had been received upon the policies effected on Mr. *Cary's* life before he can be allowed to claim anything from *Andrew Arcedeckne's* estate. I think the policies stand in different positions. I shall deal first with the three policies which were effected by *Davis*, reserving for consideration that which I have to say about the £1000 policy which was effected in 1870.

No one disputes the general law with regard to contribution by sureties, and as to the necessity of sureties bringing in whatever they receive from the principal debtor. I refer to the language of Mr. Justice *Fry* in the case of *Steel* v. *Dixon* (1) where he quoted from the judgment of Mr. Baron *Alderson* in the case of *Pendlebury* v. *Walker* (2) that "the result of that case" (that is the case of *Dering* v. *Earl of Winchelsea* (3)), "was expressed by Mr. Baron *Alderson* in *Pendlebury* v. *Walker* in these terms, that 'where the same default of the principal renders all the co-sureties responsible, all are to contribute; and then the law superadds that which is not only the principle but the equitable mode of applying the principle, that they should all contribute equally if each is a surety to an equal amount; and if not equally, then proportionably to the amount for which each is a surety.'" No one disputes that; and no one would have disputed in this

(1) 17 Ch. D. 830. (2) 4 Y. & C. (Ex.) 441.
(3) 1 W. & T. L. C. 5th Ed. p. 106; 1 Cox, 318.

case, that if the policies had been (and it was not proved they were) effected as part of the contract when the £13,000 was secured, and the premiums had been paid by the persons who signed the notes, that the policy moneys would necessarily have to be brought into contribution before anything could be obtained by one of the sureties against the others. But what was argued was, that at the time when the promissory notes were paid by the Earl of *Effingham*, he, by a separate contract, bought the policies on his own venture and on his own risk from *Davis*, and that thereupon they became his separate property, and that having become his separate property they had no further connection whatever with the promissory notes, but that he was entitled to keep whatever moneys he obtained from the policies for his own benefit without bringing them into hotchpot for his co-sureties. On the other hand, it was contended that inasmuch as the contract of suretyship was a contract of indemnity, therefore before a surety can recover anything against his co-surety he must prove that he has suffered some loss; and that he can only recover a proportion of the loss which he himself has suffered, and therefore in taking an assignment of the policies from *Davis* he has received the amount of the policies, subject, of course, to a reduction of the premiums which he had paid, and he can only say he has suffered so much loss as he has paid after accounting for the amount of the policies. Such were in effect the arguments which were addressed to me. It appears that after 1867 the policies were kept up by the Earl of *Effingham*. Mr. *Cary* died in August, 1871. Within that period of time there had been a good deal of litigation between the parties as to what were the rights of the parties and their liabilities. That litigation was commenced in Vice-Chancellor Sir *R. Malins*' Court, and the case went to the Court of Appeal and afterwards to the House of Lords, where it was decided in March, 1875.

The general principle having been admitted on both sides, and the Earl of *Effingham* having in 1867 determined to keep up the policies, and having done so, he, in October, 1871, shortly after the death of Mr. *Cary*, obtained an assignment from *Davis* of the three policies. The deed, after reciting that the policies were effected, recited "that the said several policies were effected

PEARSON, J. 1883 *In re* ARCEDECKNE. ATKINS *v.* ARCEDECKNE.

in connection with and for securing moneys raised for and then owing by the said *L. W. C. A. F. Cary*." . . . . [His Lordship having read the recitals above set forth, continued:—] *Davis* then assigned the policies to the Earl of *Effingham*. The conclusion, therefore, which I have arrived at is, that in the year 1867, when the agreement was made between *Davis* and the Earl, whom, as I have stated, I treat as Lord *Howard of Effingham*, for the assignment of the three policies, it was really and truly an agreement for the benefit of all the parties who were liable upon the promissory notes, and not an agreement for the benefit of the Earl of *Effingham* only. I cannot conceive that at that time it would have been possible for one of the sureties to take an assignment of the policies from *Davis*, who held the promissory notes, and had sued upon them, without giving his co-sureties the same rights which he claimed to purchase from *Davis*. I think, therefore, that having purchased those rights at the time and under the circumstances which I have stated, he did so purchase them, not for the benefit of himself only, but for the benefit of his co-sureties. I fully admit that afterwards there might have been transactions between the Earl of *Effingham* and the co-sureties which would have shewn that the sureties abandoned the three policies altogether, and declined to take either the burden or the benefit of them. But no such transaction took place; and I have to deal with the question at the present time as it arose under the circumstances which existed between 1867 and 1871. There was no disclaimer whatever either of the burden or of the benefit of the policies by Lord *Howard of Effingham's* co-sureties; and I hold therefore that they are entitled to claim the benefit of the moneys received for the policies, paying of course to the Earl of *Effingham* or to Lord *Howard of Effingham* the premiums and other moneys which were paid in keeping up the policies. Therefore the sum of £10,000 which was received in 1871 after the death of Mr. *Cary*, must be brought into account in settling the rights between Lord *Howard of Effingham* and *Andrew Arcedeckne's* estate.

Then, as to the policy for £1000, which, as I understand, was effected in October, 1870, by the Earl of *Effingham* upon the life of Mr. *Cary*. That was long after the liabilities of all the sureties

had been fixed, and long after each party knew comparatively what his liability was upon the promissory notes, and I think there is no rule of law whatever which prevents me from saying that the Earl of *Effingham* was entitled to effect such a policy at that time for his own benefit in respect of the share of the debt which his estate had to provide for. I hold, therefore, that the proceeds of the policy for £1000 belong to him and are not liable to be brought into account; but the proceeds of the three policies for £10,000 must be brought into account in the manner I have stated.

Solicitors: *Bennett, Dawson, & Bennett; Cutler & Turner; Pearpoint & Lock.*

T. F. M.

In re HARROP'S TRUSTS.

Settled Land Act, 1882—*Payment of Money out of Court—Appointment of Trustees.*

A testator devised freehold property to trustees in trust for his grandson for life, and then for his issue in tail. There were four trustees of the will, and the testator's grandson was one of such trustees. The will contained no power of sale. Shortly after the testator's death a portion of the property comprised in the will was purchased by a railway company under their powers, and the money was paid into Court.

Upon petition for payment of the money out of Court, an order was made appointing three of the trustees of the will, omitting the testator's grandson (the tenant for life), to be trustees of the settlement effected by the will for the purposes of the *Settled Land Act*, 1882; and the fund was ordered to be paid out to such three trustees to be held by them upon the trusts of the will.

And it appearing that the trustees of the will had advanced a large sum of money on mortgage including, by anticipation, a sum of money equivalent to the fund in Court—it was ordered that the three trustees appointed by the Court be at liberty to pay the fund to the four trustees of the will upon the execution by them of a declaration of trust in favour of the three trustees of so much of the principal sum secured by the mortgage as should be equivalent to the proceeds of the fund ordered to be paid out of Court.

JONAH HARROP, by his will, dated the 27th of May, 1862, gave, devised, and bequeathed to his trustees all his freehold, copyhold, and leasehold estates, and all his personal estate and

PEARSON, J. 1883 *In re* HARROP'S TRUSTS.

effects, upon trust, in the first place, to raise by sale or mortgage certain portions, and then to pay the rents, profits, interest, dividends, and proceeds of all his said estates to his grandson, the Petitioner, *Montagu Hulton-Harrop*, for life, and after his death the whole of the estates comprised in the will were to be held for the use of the eldest son of *Montagu Hulton-Harrop* and his issue in tail male, and on failure of such eldest son and his issue male, then the same to be upon certain uses therein mentioned. The will contained a power to the trustees to lay out any portion of the personal estate in the purchase of any freehold or leasehold messuages, lands or tenements, and from time to time to sell the same and to re-invest the money upon other property of a like nature. But the will contained no power of sale of real estate and no express trust for re-investment of the proceeds of the sale of such real estate. Neither did the will contain any restriction upon investment of such proceeds upon mortgage of real estate.

The testator died on the 9th of September, 1866, and shortly after his death a small piece of land belonging to his estate was purchased by the *London and North Western Railway Company* under the powers of their Acts, and the purchase-money was paid into Court and invested in the sum of £1092 Bank Annuities, and the dividends were ordered to be paid to *Montagu Hulton-Harrop* for his life. At the present time the trustees of the before-mentioned will were *Montagu Hulton-Harrop*, and three other persons, namely, *T. R. Coulthart*, *W. Hulton*, and *C. A. Hulton*, all of whom were Petitioners. The said trustees, in pursuance of the trusts of the will, had lately advanced £12,000 on first mortgage of certain freehold hereditaments, and for that purpose they had overdrawn their trust account at their bank to the extent of the sum which would be realised by the sale of the said sum of £1092 Bank Annuities.

The Petitioners desired that the said sum of £1092 might be applied in payment to the trustees of the sum so overdrawn. A petition for that purpose was consequently presented by the said four trustees praying that the fund in Court might be paid out to the trustees of the will of *Jonah Harrop*, and that if necessary the Petitioners might be appointed trustees of the will for the

purpose of the *Settled Land Act*, and that the costs might be paid by the railway company under the *Lands Clauses Consolidation Act*.

Chadwyck Healey, in support of the petition.

Speed, for the railway company.

PEARSON, J., desired it to be laid down as a rule of practice in his branch of the Court that in no case could a tenant for life, or a person who might become tenant for life, be appointed a trustee of a settlement for the purposes of the *Settled Land Act*. He desired to consider the form of order to be made in this case.

PEARSON, J., subsequently made the following order:—That the Petitioners, the trustees of the will, other than *Montagu Hulton Harrop* the tenant for life, be appointed trustees of the settlement effected by the will for the purposes of the *Settled Land Act*; and that the sum of £1092 Bank Annuities in Court to the credit of *Ex parte London and North Western Railway Company* and to the account of the settled estates of *Jonah Harrop*, deceased, be sold, and the proceeds thereof paid to the Petitioners other than *Montagu Hulton-Harrop*, as trustees of the will, for the purposes of the said Act; and it appearing that the said Petitioners, in anticipation of this order, had advanced out of their own moneys a sum equivalent to the proceeds of sale of the said sum of £1092 Bank Annuities, which, together with other moneys in their hands forming part of the property subject to the trusts of the said settlement, amounting in the whole to £12,000, had been invested by them upon the security of a first mortgage of certain freehold hereditaments in the county of *Salop*, it was ordered that the Petitioners other than *Montagu Hulton-Harrop*, as trustees of the said will, be at liberty to pay the proceeds of such sale to the four Petitioners upon the execution by them of a declaration of trust in favour of the Petitioners other than *Montagu Hulton-Harrop*, as trustees of the will, of so much of the principal sum of £12,000 secured by the said mortgage as should be equivalent to the proceeds of the sale of the sum of £1092 Bank Annuities, together with interest on such proportionate sum at the rate fixed

PEARSON, J. 1883 *In re* HARROP'S TRUSTS.

by the said mortgage deed; and the costs of the investment and incident thereto were ordered to be paid by the railway company.

Solicitors: *Rooke & Son*; *R. F. Roberts.*

T. W. G.

PEARSON, J. 1883 *June* 26.

In re HARMAN AND UXBRIDGE AND RICKMANSWORTH RAILWAY COMPANY.

[1883 H. 1491.]

Vendor and Purchaser—Objections to Title—Notice of Trust—Recitals in Deed.

In 1840 property was mortgaged to *W.* in fee, there being nothing in the mortgage deed to shew that he was not the beneficial owner of the mortgage money. He died in 1842, having by his will devised and bequeathed his real and personal estate to three trustees (of whom his wife was one), on trusts for the benefit of his wife and children, and having appointed the same three persons executors. He also devised and bequeathed his trust and mortgage estates to the same three persons, subject to the trusts and equities affecting the same respectively. The widow alone proved the will, and alone acted as trustee. The other two trustees disclaimed the trusts. In 1854 the widow obtained a decree absolute foreclosing the mortgage. In 1865 she, by a deed indorsed on the mortgage deed, conveyed the property, without receiving any pecuniary consideration for it, to *K.*, *C.*, and *B.*, in fee, as joint tenants at law and in equity. The conveyance contained a recital that the testator held the mortgage money on an account under which *K.*, *C.*, and *B.* were then solely entitled thereto, as was thereby acknowledged, whereby the widow, as trustee under the testator's will, was trustee only of the property for *K.*, *C.*, and *B.*, and they had requested her to convey it to them. On a subsequent sale of the property by persons who had purchased it from *K.*, *C.*, and *B.*, the purchasers required evidence of the truth of the recital in the deed of 1865 that *K.*, *C.*, and *B.* were entitled to the mortgage money. And, assuming that the testator was a trustee of the mortgage money, the purchasers required the vendors to shew that the property sold was comprised in the trust; that *K.*, *C.*, and *B.* were duly appointed to succeed the testator in the trust; and that they had an effectual power of sale and of giving a receipt for the purchase-money:—

Held, that it would be contrary to the practice of the Court to go behind a recital evidently framed for the purpose of keeping notice of trusts off the conveyance; that the requisitions need not be answered; and that a good title had been shewn by the vendors.

ADJOURNED SUMMONS.

This was a summons under the *Vendor and Purchaser Act*, 1874.

PEARSON, J.

1883

In re HARMAN AND UXBRIDGE AND RICKMANSWORTH RAILWAY CO.

On the 9th of December, 1882, an agreement was entered into between *Samuel Harman* and *W. B. Harman* of the one part, called the vendors, and *Edward Wickham*, the secretary of the *Uxbridge and Rickmansworth Railway Company*, on behalf of the company, called the purchaser, of the other part, for the sale to the purchaser of the estate and interest of the vendors, consisting of an estate in fee simple free from incumbrances, in some land at *Hillingdon*. The agreement provided that the vendors should on the signing of it deliver to the purchaser's solicitors an abstract of their title to such an extent as the solicitors should require, and should deduce a good title to their estate and interest.

The abstract of title delivered by the vendors under this agreement commenced with a mortgage, dated the 4th of September, 1840, in fee, of property, which included that agreed to be sold to the company, by *R. W. Grainge* to *William Thomas Beeby*, to secure the repayment of £8000 advanced by *Beeby* to *Grainge*. The deed contained a covenant by *Beeby* to make further advances to *Grainge* to the extent of £10,700 in the whole, in case certain buildings should be erected on the property. There was nothing in this deed to shew that *Beeby* was not the absolute beneficial owner of the mortgage money. In October and December, 1840, respectively, *Beeby*, in pursuance of this covenant, made two further advances of £1000 each to *Grainge*. *W. T. Beeby*, by his will, dated the 25th of June, 1840, appointed *G. Colquhoun*, *W. L. Smith*, and his wife *Deborah Beeby*, executors and executrix thereof. And he devised all his real estate, and bequeathed the residue of his personal estate, unto and to the use of *Colquhoun*, *Smith*, and *Deborah Beeby*, their heirs, executors, administrators, and assigns respectively, according to the nature and quality thereof, upon trust for sale and conversion as therein mentioned, and to stand possessed of the proceeds of the sale and conversion on trust to pay his debts and funeral and testamentary expenses, and to invest the residue, and to stand possessed of the same on certain trusts therein mentioned for the benefit of the testator's wife and children. The will also contained a devise and bequest of trust and mortgage estates to the same three persons as trustees, subject to the trusts or equities of redemption affecting the same respectively, but so that the moneys due to the testator upon any such mortgage

PEARSON, J. 1883 *In re* HARMAN AND UXBRIDGE AND RICKMANSWORTH RAILWAY CO.

or mortgages, so far as he was beneficially interested, should be considered as part of his residuary personal estate. By a codicil dated the 7th of June, 1841, the testator revoked the appointment of *Colquhoun* as executor and trustee of his will, and substituted *Samuel Jackson* in his place. The testator died on the 1st of March, 1842. On the 11th of June, 1842, the will was proved by the widow alone. *Smith* and *Jackson* never proved and never acted as trustees, and on the 31st of August, 1843, they executed a deed-poll by which they renounced and disclaimed all the devises and bequests made to them by the will and codicil. On the 19th of January, 1850, *Deborah Beeby* commenced a suit in the Court of Chancery against the persons then entitled to the equity of redemption of the mortgaged property for foreclosure. In this suit the ordinary foreclosure decree was made on the 27th of February, 1851, and on the 29th of July, 1854, the decree was made absolute.

By a deed dated the 1st of August, 1865 (indorsed on the mortgage deed of the 4th of September, 1840), and made between *Deborah Beeby* of the one part, and *W. P. Knightly*, *John Cox*, and *Walter Thomas Beeby*, of the other part, after a recital that the testator held the money secured by the mortgage on an account under which *Knightly*, *Cox*, and *Walter Thomas Beeby* were then solely entitled thereto, as was thereby acknowledged, whereby *Deborah Beeby*, as trustee under the will of the testator, was trustee only of the property comprised in the mortgage deed and so foreclosed for *Knightly*, *Cox*, and *Walter Thomas Beeby*, and they had requested her to convey the property to them, it was witnessed that, in pursuance of the agreement and in consideration of the premises, *Deborah Beeby* did grant and release to *Knightly*, *Cox*, and *Walter Thomas Beeby*, their heirs and assigns, the property comprised in the mortgage, to hold the same unto and to the use of *Knightly*, *Cox*, and *Walter Thomas Beeby*, their heirs and assigns, as joint tenants at law and in equity.

By a deed dated the 31st of December, 1868, *Knightly*, *Cox*, and *Walter Thomas Beeby* conveyed to *George Harman* in fee the property afterwards agreed to be sold to the railway company. This deed contained no covenant for title by the vendors, except the ordinary trustees' covenant that they had not incumbered.

By his will, dated the 19th of January, 1869, *George Harman* devised all the freehold hereditaments to which he should be beneficially entitled at his death unto and to the use of *Samuel Harman* and *W. B. Harman*, their respective heirs and assigns, in equal shares as tenants in common. *George Harman* died on the 15th of March, 1875.

The company, by their requisitions upon the title thus shewn by the vendors, required evidence of the truth of the recital contained in the deed of the 1st of August, 1865, that *Knightly, Cox,* and *Walter Thomas Beeby* were entitled to the mortgage money. And, assuming that *William Thomas Beeby*, the original mortgagee, was a trustee of the mortgage money, the company required the vendors to shew that the property now sold was comprised in the trust; that *Knightly, Cox,* and *Walter Thomas Beeby* were duly appointed to succeed *William Thomas Beeby* in the trust; and that they had an effectual power of sale and of giving a receipt for the purchase-money. The vendors replied that inquiry had been made of the solicitors to the original vendors, and that the information asked for could not be obtained. The company's solicitors did not consider this answer satisfactory, and declined to accept the title. This summons was then taken out by the vendors, asking a declaration that the requisitions had been sufficiently answered, and that a good title had been shewn in accordance with the contract.

Cozens-Hardy, Q.C., and *Seeley*, for the vendors:—

We rely on the conveyance of 1865. The results would be most mischievous if the Court were to go behind the recital in that deed, and imply a trust. The conveyance is to three persons as joint tenants at law and in equity, and there is nothing to shew that they were trustees. Since 1865 the possession has been in accordance with that deed.

Everitt, Q.C., and *Loughborough*, for the company:—

The mortgage of 1840 was either a trust mortgage or it was not. There is no evidence of any trust except in the mode in which the mortgagee's devisee and executrix dealt with the property. She was a trustee of his will, and, unless the mortgage money was trust property, her dealing with the mortgaged

PEARSON, J. 1883 *In re* HARMAN AND UXBRIDGE AND RICKMANSWORTH RAILWAY CO.

property was improper. The recital in the deed of 1865 cannot bind her *cestuis que trustent*. There is sufficient notice to put us on inquiry, and if it should turn out that the conveyance of 1865 was a breach of trust we should be liable for it: *Malpas* v. *Ackland* (1). If the mortgage money was not trust money, the deed of 1865 would be a conveyance without consideration by a person who had no right to convey without consideration. We are, therefore, entitled to know whether the recital, that the three persons named had become entitled to the property, was true. Apparently the devisee in trust was giving away the testator's trust property for nothing. There is no admission by the testator that he was a trustee of the mortgage money, and the presumption is that he was not.

Again, if the mortgage money was subject to a trust, we are entitled to know whether the trustees have power to sell the mortgaged property which has become theirs by the foreclosure, and to give a receipt for the purchase-money.

[PEARSON, J.:—Suppose *A.* dies, having by his will devised all estates vested in him by way of mortgage to *B.*, whom he appoints his executor. *B.* would thus become entitled to the moneys secured by the mortgages. Suppose that one of the mortgages was held by *A.* as the surviving trustee of another will. *B.* does not dispute this, and conveys the property to new trustees appointed by that will by a deed which recites that they are entitled to the mortgage money on a joint account. Would not that transaction be perfectly valid?]

If the recital was untrue, it would not bind the beneficiaries under *A.'s* will. In an ordinary case there would have been a deed to which the testator himself was a party, shewing that he was a trustee. An executrix cannot make a bad title good by a mere acknowledgment. In fact, in the present case, from the time which had elapsed since the testator's death, the executrix must be taken to have been acting as trustee, not as executrix. A trustee cannot make such an admission: *Lewin* on Trusts (2).

[*Cozens-Hardy* referred to *Davidson's* Conveyancing (3), as shewing that, on a transfer of a mortgage on the appointment of

(1) 3 Russ. 273. (2) 7th Ed. p. 304.
(3) 4th Ed. vol. ii. pt. ii. p. 806.

a new trustee, a recital that the mortgage money had become the property of the continuing trustee and the new trustee would be properly inserted.]

The deed of 1865 was not a transfer of a mortgage; the mortgage had been foreclosed and Mrs. *Beeby* had become the owner of the property in equity as well as at law, and the recital must be dealt with on that footing. The common form of recital, which is referred to, applies only to the transfer of a mortgage. A trustee cannot properly buy or sell land of which he is trustee without shewing on the face of the deed that he is a trustee: *Key & Elphinstone's* Precedents (1); *Prideaux's* Precedents (2). It would be a strange thing for a trustee to bind himself, as the mortgagee did by the deed of 1840, to make further advances out of his trust fund.

PEARSON, J. (after stating the facts), continued:—

If the deed of 1865 had simply contained a recital that Mrs. *Beeby* was seised of the property in fee, and then had conveyed it to the three grantees for a nominal consideration, I think it would have been open to objection. But the deed was indorsed on the mortgage deed, and it is plain that Mrs. *Beeby* was dealing with her title as mortgagee,—that she was entitled to the mortgage money and to nothing more. The deed contains a recital that the testator held the money secured by the mortgage on an account under which the three persons to whom the conveyance is made were then solely entitled thereto, and that Mrs. *Beeby* was a trustee of the property for them., and they had requested her to convey it to them. The present purchasers say that that recital is not a satisfactory one, that it is not one on which they can rely, and that they are entitled to call on the vendors to shew what reason the executrix had for acknowledging that her testator held the mortgage money on such an account as is there mentioned. It is admitted that, according to a very convenient practice, it is usual, when a mortgage is made to trustees, to keep the trusts off the face of the mortgage deed, and to introduce a recital that the persons who are in fact trustees, are entitled to the mortgage money on a joint account,

(1) 2nd Ed. vol. i. p. 338. (2) 11th Ed. vol. i. p. 315.

PEARSON, J. 1883 *In re* HARMAN AND UXBRIDGE AND RICKMANSWORTH RAILWAY CO.

and it is admitted that in such a case the Court has always refused to make any inquiry into the trusts, because to do so would defeat a practice which has been introduced for the benefit of Her Majesty's subjects. I am told that the executrix had no authority to put such a recital into the deed, that the purchaser cannot rely on it, but must be treated as having had notice of the trusts, or that the mortgage money belonged to the testator's own estate. If I were to accede to this contention, I think I should be making a most mischievous decision, and should be departing from the precedents set by my predecessors in refusing to look behind such a recital into the trusts affecting mortgage money. Every one knows that when in a mortgage deed the mortgage money is stated to belong to several persons on a joint account those persons are in ninety-nine cases out of a hundred trustees of the money, and yet the Court has always resolutely refused to go behind the recital or to inquire what the trusts are. I am of opinion that the executrix was entitled to put this recital into the deed, and that the purchasers are entitled to rely on it as a protection against any trusts of the property which may exist. If I were to hold otherwise it would be almost impossible for a person in the position of Mrs. *Beeby* to dispose of a testator's property without a suit to administer his estate, a conclusion at which I should certainly not arrive, unless I was compelled to do so by the decision of a superior Court.

The next objection is that the Court must hold that the three persons to whom the conveyance of 1865 was made were new trustees of the mortgage money, and that the vendors are bound to shew the nature of the trusts on which they held it. So to hold would, I think, be to go directly contrary to a series of decisions of this Court. The object of such a recital being to keep the trusts off the face of the deed, the Court has always said that the persons to whom the conveyance is made can deal with the property as absolute owners. I am of opinion that there is nothing whatever in the objection, and I dismiss the summons.

Solicitors for Vendors: *Paterson, Sons & Garner*, for *Woolls, Paterson & Garner, Uxbridge.*

Solicitors for Company: *Burdett-Cunningham & Co.*

W. L. C.

SMITH *v.* ARMITAGE.

DENMAN, J.

1883

July 19, 20.

[1881 S. 5118.]

Practice — Trial — Administration Action — Allegations of Fraud — Wilful Default—Reference to Chambers.

In an action for ordinary administration it is competent for the Court to allow a case of wilful default, though not stated in the pleadings, to be raised at any time during the action, but allegations of fraud and wilful default ought not generally to be adjourned, but should be disposed of at the hearing.

THIS was an action instituted in 1881, for the administration of the will of *George Armitage*, who died on the 1st of February, 1871, and the Plaintiffs (who were persons who had acquired a derivative interest in the estate) by their pleadings made charges of improper conduct against the Defendants, the trustees of the will, amongst which were the following paragraphs of the statement of claim:—

Par. 6. "The Defendants have not duly realized and applied the testator's estate, but have administered it in a very irregular manner, and greatly to the inconvenience and injury of the persons interested in his estate."

Par. 12. "The course of administration of the said estate by the Defendants was conducted mainly in the interests of the Defendant *John Armitage*."

Par. 8 of the statement of claim stated an agreement between the predecessor in title of the Plaintiffs and the Defendants, which the Plaintiffs said was founded upon misrepresentation on the part of the Defendants, and they alleged that he had not any separate or independent advice when he was induced to sign the said agreement, and was ignorant of the nature and extent of his rights, and he was not in equity bound thereby, and they asked that the agreement might be set aside.

When the action came on for trial the Plaintiffs asked that a decree for ordinary administration accounts and inquiries might be made, and that they might be at liberty in the course of taking those accounts and inquiries to proceed with the case of wilful default raised by the pleadings.

DENMAN, J.

1883

SMITH v. ARMITAGE.

Barber, Q.C., and *J. Beaumont*, for the Plaintiffs :—

The practice of the Court now is to allow charges of wilful default to be gone into at any time during the action, even after the hearing: *Lewin* on Trusts (1); *Coope* v. *Carter* (2); and this is especially the case since the *Judicature Acts*: *Job* v. *Job* (3); *Mayer* v. *Murray* (4); *Barber* v. *Mackrell* (5); *In re Symon* (6).

Higgins, Q.C., *Warmington*, Q.C., *Dundas Gardiner*, and *Beddall*, for the Defendants :—

We have a right to have the charges of wilful default disposed of at the hearing, and if they are not proved then to have the costs occasioned by those charges: *Fane* v. *Fane* (7); *Bartlett* v. *Wood* (8); *Sleight* v. *Lawson* (9).

DENMAN, J., after consulting Mr. Justice *Kay*, stated the facts, and said :—

Here there are allegations of wilful default and improper conduct on the part of the Defendants. That being so, when the case came to trial, Mr. *Barber*, for the Plaintiffs, proposed to abstain from giving any evidence in support of these particular allegations in the statement of claim, and asked me to make an ordinary administration decree excluding altogether the questions of wilful misconduct, leaving them to be disposed of hereafter, by the Chief Clerk or in some other way. The Defendants, on the other hand, said, that being brought here on specific charges made against them, and having been put to considerable expense, they were prepared to meet those charges. It is said that according to the practice of the Chancery Division it is competent to the Court, and proper, to leave matters such as these to be disposed of hereafter in some such way as I have described. It appears to me that there is no such practice made out. I admit that I am satisfied that the Court has a discretion in every case to postpone inquiring into the conduct of trustees, and to allow the

(1) 6th Ed. p. 740.
(2) 2 D. M. & G. 292.
(3) 6 Ch. D. 562.
(4) 8 Ch. D. 424.
(5) 12 Ch. D. 534.
(6) 21 Ch. D. 757.
(7) 13 Ch. D. 228.
(8) 9 W. R. 817.
(9) 3 K. & J. 292.

inquiry to stand over in such manner as may appear reasonable, and that it is not absolutely necessary for the Court in every case to decide all the issues at once which may be brought before it at the hearing. I think it would be competent to the Court if it saw good reason to try the case in part, and to adjourn it in part. But I think it would require a very strong case to make it do so; and that the hearing is the proper time to dispose of questions of the kind, and it is the proper time at which allegations of fraud should be disposed of. I think that except in the strongest case, and for the strongest reasons, the Court ought not to allow parties to come with such allegations with no evidence to support them, and then to ask the Court to refer questions such as these for disposal by the Chief Clerk, or in any other way. Mr. *Barber*, having the matter now fully before him, declines now to go into any such charges, obviously because he is not in a position so to do, and has not the materials.

I have given the Plaintiffs their election of doing the best they can at this stage, if they have the evidence: they have declined this course, and stand on their right to have an ordinary administration judgment, and to have deferred for future occasion all inquiry into these particular matters.

I have consulted with Mr. Justice *Kay* in this case as to what I conceive to be the result of the authorities, and I have his assent to what I conceive to be that result. And I think it to be important in matter of practice such as this not to go back to any old practice of the Court which may have existed before the *Judicature Act*, but to found my decision on cases decided since the Act. Because it is obvious that where the pleadings have been materially altered, the rules of the old practice may not be applicable.

Now the cases cited seem to me clearly to establish that until charges of this sort are put on the pleadings the Court ought not to deal with them at all. Another proposition established is that the mere fact that they are not on the pleadings will not prevent such charges from being raised if in the course of the investigation, facts are ascertained which render it reasonable to believe there has been wilful default, and in such a case the Court will assist parties complaining of misconduct by trustees. Those two

DENMAN, J. 1883 SMITH v. ARMITAGE.

propositions are totally wide of the point contended for here, namely, that where the parties ought to be ready for the hearing and specific charges are made against defendants, it is in the option of the plaintiff to say he will not inquire into the charges, nor go into the issues raised, in fact that he will have the case disposed of in part, and have only an administration decree, I think he is bound to go on unless he establishes a strong ground to induce the Court to try the case piecemeal. I have nothing before me in the case to induce me to do so. The Plaintiffs, by their statement of claim purport to be ready to prove acts of misconduct which are very specifically formulated, the Defendants are ready, and I think they have a right to have those charges disposed of now.

I think it right to give an ordinary administration decree, but the question then arises: what ought I to do with the residue of the statement of claim. I think there can be no doubt that on the ground I have pointed out I ought to dismiss the action altogether as far as it goes for more than the ordinary decree, and that with costs, because it is quite obvious that if it had not been for those charges it would have been given, as a matter of course, by a simple inexpensive proceeding instead of by bringing the Defendants here to meet heavy charges at probably considerable expense, so that the Plaintiffs have clearly brought this upon themselves. I think it would be most unjust to keep those charges hanging over the Defendants, and therefore the proper result is to dismiss the action except so far as it seeks for an administration decree, and as to that I think it right that the costs should stand over; it may be that in the course of the inquiries something much more serious may be established, and that other considerations may have to be gone into.

Solicitors: *Learoyd & Co.; Speechly, Mumford, & Landon.*

C. W. C.

CLEATHER *v.* TWISDEN.

[1882 C. 1285.]

DENMAN, J.

1883

July 17, 18, 19, 23.

Solicitors—Deposit of Bonds—Liability of Partner.

Trustees deposited with a solicitor certain bonds payable to bearer. His partner had no actual knowledge of this, but letters referring to the bonds were charged for in bills of costs delivered by the firm; letters referring to the bonds were also copied into the letter book of the firm; and cheques for money received as interest on the bonds were drawn on the account of the firm.

The solicitor made away with the bonds:—

Held, that under the circumstances his partner was liable.

Earl of Dundonald v. *Masterman* (1) referred to.

THE Plaintiffs in this case were the executors and trustees under the will of Colonel *Cleather*, who died in 1875. He had employed as solicitors the firm of *Hayes, Twisden, & Co.*, which consisted of *T. E. Twisden*, *Charles Lewis Parker*, and *Edward Kelley* (since deceased), and the executors continued to employ them, *Parker* having the entire management of that business. In March, 1877, part of Colonel *Cleather's* estate was invested in three *New Zealand* bonds for £500, one *Cape of Good Hope* bond for £500, one for £100, and two for £200, all payable to bearer. These bonds had been kept by *G. G. Cleather*, one of the executors, but on leaving *London*, in March, 1877, he, with the assent apparently of the others, delivered the bonds to *Parker* for custody in the strong room of the firm, though it was not ascertained whether they were put there. Soon afterwards one of the £200 *Cape* bonds was paid off, and the money was received by *Parker* and duly accounted for. Afterwards other bonds were sold and the proceeds were duly accounted for, but there remained the three *New Zealand* bonds for £500 and one *Cape* bond for £200. The dividends or coupons on these were duly accounted for and paid by cheques of the firm until the month of November, 1881, when *Parker* absconded, and it was discovered that he had misappropriated these bonds, and also other moneys of Colonel *Cleather's* estate.

(1) Law Rep. 7 Eq. 504.

DENMAN, J.

1883

CLEATHER v. TWISDEN.

The executors brought this action against *T. E. Twisden*, claiming a declaration that as a partner in the firm he was liable to make good the value of these bonds; and also other moneys intrusted to *Parker* for investment on mortgage, as to which the liability of *Twisden* was scarcely disputed.

The evidence against the Defendant consisted chiefly of bills of costs delivered in the name of the firm, in which matters relating to these bonds were mentioned, and of letters charged for in the bills of costs written by *Parker* to the several trustees referring to the bonds, or some of them. One charge, for instance, was for "Letter to Mr. *Gordon Cleather* hereon informing him of intended payment of proportion of *Cape* interest." In one letter *Parker* spoke of the bonds as being "in my possession." These letters were copied in the press-book of the firm. It was shewn that *Twisden* was aware that *Parker* was acting in the distribution of the estate. The result of the evidence is stated in the judgment of the Court.

Barber, Q.C., and *Clare*, for the Plaintiffs:—

This money was received by *Parker* in the course of collecting and distributing the estate of Colonel *Cleather*, which is clearly part of the duty of a solicitor, and his partner is therefore liable for his misdeeds. The trustees had a right to invest the money in these bonds, and who was to keep them? A solicitor keeps deeds, and why not bonds? In either case he has power to commit a fraud. At all events it is clear from the books and from the bills of costs and the letter books that Mr. *Twisden* might have known and ought to have known that *Parker* had these bonds: *Earl of Dundonald* v. *Masterman* (1); *St. Aubyn* v. *Smart* (2); *Atkinson* v. *Mackreth* (3).

The evidence was then put in and witnesses were examined.

Rigby, Q.C., and *Rawlins*, for the Defendant:—

The question is one of dry law; on which of two innocent persons the loss is to fall. A solicitor is not liable for what his partner does unless it is part of the regular business, and it is no

(1) Law Rep. 7 Eq. 504. (2) Law Rep. 5 Eq. 183.
(3) Law Rep. 2 Eq. 570.

part of the business of a solicitor to hold foreign bonds payable to bearer. A solicitor is liable for money entrusted to his partner for investment on mortgage, because that is part of his regular business, and he holds the mortgage deeds, as he may want to refer to them. But he has no occasion to hold money bonds. No doubt if the firm chooses to hold bonds as a firm all the members are liable, but if a client chooses for his own convenience, without the knowledge of one partner, to deposit bonds with another partner, the firm is not liable. It was a breach of trust so to deposit them, and though Mr. *Twisden*, no doubt, knew that *Parker* was acting for the trustees, he could not expect this to be done by them. As to the receipt of the money for interest, *Parker* might have had only the coupons given to him. If *Twisden* had asked *Parker* anything about the deposit of these bonds, *Parker* might have answered, "It is a private business of mine with which you have nothing to do": *Lindley* on Partnership (1); *Comer* v. *Bromley* (2); *Marsh* v. *Keating* (3).

Barber, in reply:—

Twisden must be held to have had notice, and is liable: *Story* on Partnership (4).

July 23. DENMAN, J., after stating the facts of the case, and that in his opinion what was done wrong by *Parker* was without the cognizance of *Twisden*, who had no actual knowledge of the custody of these bonds by *Parker*, proceeded:—

That being so, the case becomes very difficult. The Plaintiffs claim that the Defendant, Mr. *Twisden*, who is morally quite innocent of any wrong, and actually innocent of any knowledge of what his partner *Parker* was doing, should make good the loss occasioned by *Parker's* fraud and misconduct. Now it does not follow that because this seems a very hard contention against a partner, therefore it may not be good in point of law. The question is really whether, upon the evidence that has been given, as to which there is hardly any conflict, this is one of those cases in which a partner is responsible.

(1) 2nd Ed. pp. 248, 318.
(2) 5 De G. & Sm. 532.
(3) 2 Cl. & F. 250.
(4) 7th Ed. §§ 107, 108.

DENMAN, J. 1883 CLEATHER v. TWISDEN.

There are some cases which bear strongly upon this case, though whether there is any which is exactly in point I very much doubt; but I have to bear in mind the principles of those cases in deciding whether to fix the Defendant with the defalcations of his partner. The first case which seems to bear strongly on this case is *Harman* v. *Johnson* (1), in which it was laid down and treated as law, I think, both at Common Law and in Chancery, that it is not *primâ facie* the business of a solicitor to take care of securities or money for a client. But I think it is also clear that this principle cannot be acted upon without reference to the circumstances in each particular case, and to the course of business as between the parties trusting the securities on the one hand, and every member of the firm on the other hand. It cannot be treated as a matter of absolute certainty that in any case in which securities have been trusted to one partner, this may not possibly be, under the circumstances, "firm business," because although it is not *primâ facie* the duty of a solicitor to act as a money scrivener and to receive money, or to act as a warehouseman, or as a banker, there is no rule of law laying it down that a solicitor may not do such business, and there is nothing to make it criminal or wrong or negligent in a solicitor so to do under particular circumstances. If, therefore, it turns out that the solicitor has so acted as to make it "firm business," by reason of the mode in which he has dealt with it in the books of the firm, and the other partners in the firm have such notice of it as reasonable and prudent people would get from a proper examination of their own books—there is nothing which decides that in such a case it may not be "firm business." It would be a question of fact in each case, and even though a partner might say, "I do not know anything about this transaction;" yet, looking at his dealings with his partner, and at the dealings of the partner with the persons who trusted him, it may after all be "firm business." That seems to me to be the result of the cases, and in this case it is a matter of some nicety. We have to look at the transactions from the beginning to the end in order to see whether the property in question has been so dealt with as to make it "firm business" as against every member of the firm.

(1) 2 E. & B. 61.

The first question which was raised in the case was, "Did the Plaintiffs in the first instance trust *Parker* with the securities in question as a member of the firm, or did they, because he was a convenient person to trust, or an intimate friend, and so forth, take the risk of his having the custody of the bonds, and for convenience to themselves allow him to keep them in his possession? The evidence upon that part of the case seems to me difficult to deal with, and I think that much might be said on both sides.

[His Lordship then expressed his opinion that the executors had not been careful trustees when they allowed *Parker* to have possession of securities payable to bearer; and that on the evidence and correspondence he came to the conclusion that they had trusted *Parker*, not as a friend, but as a member of the firm. Further, though the letters relied upon were written by *Parker* in his own name, and in the singular number, they were charged for in the bills of costs, and were entered in the letter book of the firm; the money received from the coupons went to the account of the firm and was paid over by cheques of the firm. These were matters of very great importance in considering whether upon the whole one ought here to draw the inference that these were transactions of the firm.]

Some of the expressions in the letters are very strong, and the question is whether they are strong enough to bring the case within *Earl of Dundonald* v. *Masterman* (1), which appears to me the strongest case in favour of the Plaintiffs. That again seems very much to depend upon what the firm was undertaking to do during all these years. That again must depend upon what *Parker* was undertaking to do, subject to this, that the firm will be responsible only for what *Parker* undertook to do, so far as it might reasonably be found from the books of the firm that the firm was recognising this as a matter in which he was acting for the trust. Suppose that the Court came to the conclusion that *Parker* had received certain moneys upon coupons sent to him, and that he had for the mere duty of collecting the money charged the parties so much and put it into the books of the firm or passed it through the books of the firm, I do not think that that would have gone far in favour of the Plaintiffs. But if upon the whole

(1) Law Rep. 7 Eq. 504.

DENMAN, J. 1883 CLEATHER v. TWISDEN.

the evidence shews that, judging from the cheques, letter-books, bills of costs, and documents, the Court comes to the conclusion that the firm must have been aware that *Parker* was acting in the distribution of the money forming part of the trust, then I think that, according to the authorities, I am bound to say that each and every partner is liable.

I have already said that I entirely absolve Mr. *Twisden* from all blame in these matters—from all actual moral blame—and I wish I could say so much as to the trustees. I think it was an imprudent thing to lodge these securities with *Parker;* so much so that I do not mean to give them their costs.

Mr. *Rigby*, in his very able argument for the Defendant, candidly and boldly dealt with the facts against him in the ablest way and made as good a case for Mr. *Twisden* as it was possible to make, and I feel this to be satisfactory when I am going to decide against Mr. *Twisden*. As to the bonds, he said that it had never been decided that it was part of the duty of a solicitor to take charge of such things. That I have already dealt with, but the question is not whether it is within the scope of the business of a solicitor in general, but whether it is within the scope of the business of solicitors looked at with reference to what they had undertaken; and that must be ascertained from the documents and the evidence in the case. Was there fair and sufficient notice to the firm of what the partner was about? As to the general business of solicitors, I think that *Harman* v. *Johnson* (1) is in favour of the proposition that this is not the ordinary business of a solicitor. Mr. *Rigby* then contended that these bonds were not delivered to *Parker* as a member of the firm, but I have already said that I draw the conclusion in point of fact that however rashly the trustees acted they trusted *Parker* as a member of the firm.

[His Lordship then stated and commented on the entries in the bill of costs, and the letters copied in the letter-book of the firm as mentioned above.]

The question what is the proper inference to be drawn from a great many circumstances, and a great many documents, such as these, really becomes a question of fact in the nature of a question

(1) 2 E. & B. 61.

for the jury. Was this so dealt with by the parties as to be firm business? I do not think I need go more into detail in the matter, but say that the result to which I have arrived is that it was firm business. However reluctant I am to charge a perfectly innocent man with the defalcations of his partner, I cannot say that there is not ground upon which I ought to hold and must hold, that this was firm business, and that the bonds were in *Parker's* custody, and that there was what the law must call actual information to the whole of the members of the firm that these bonds were in *Parker's* custody, for the purpose of distributing the money to the persons entitled, or of assisting the trustees in the distribution of the money. I cannot refrain from the conclusion that it is a case in which on that principle the Defendant is liable.

I said that I thought this case came within the authority of *Earl of Dundonald* v. *Masterman* (1), and lest I should have misinterpreted that case I will presently state what seems to me to be really the substance of that case, which came to a result different from that arrived at in other cases which at first sight seemed to me very similar. There was a case of *Plumer* v. *Gregory* (2), before Vice-Chancellor *Malins*, in which a distinction was made between two sums of money, one of £1300 and the other of £1700, on grounds which at first sight I thought might avail to absolve the Defendant from responsibility in this case. The case of *Earl of Dundonald* v. *Masterman* seems to me to come to this, that if the business was business which devolved upon the firm the necessity, and in which the firm had undertaken the duty of dealing with the property and of assisting the parties to manage the property, then if in the management of that property securities get into the possession of any member of the firm who had undertaken that duty, and he fraudulently misappropriates the property, he makes his partners responsible. In that case the evidence furnished by charges made in reference to these matters in the bills of costs becomes evidence of the most important kind. So it was dealt with by Vice-Chancellor *James* (3), and in the course of the argument he says, "You have

(1) Law Rep. 7 Eq. 504. (2) Law Rep. 18 Eq. 621.
(3) Law Rep. 7 Eq. 510.

DENMAN, J. 1883 CLEATHER v. TWISDEN.

to get rid of the bill of costs." So throughout the case he dealt with it, but the principal question seems to me to be this. Did the partner who acted for the firm in the matter, or who appeared to be the firm in the matter—for I think the defendant there did appear to the parties to be the firm—did he take upon himself, as to them, to represent the firm, and was he supposed by them to be the firm? Did he undertake to deal with and to make use of the documents in such a way as to be acting for the partnership in that matter? If I am wrong in my inference as to what that case really amounts to, then I can be corrected.

I think that, if taken in a reasonable way, it is impossible not to say, looking at the bills of costs, looking at the letters, looking at the press-copy letter book, looking at the expressions in those letters and at the course of dealing, that to a certain extent *Twisden* did know that the trustees were dealing with *Parker* in the distribution of the estate, then it is impossible to escape from the conclusion that, according to the authorities, and especially according to *Earl of Dundonald* v. *Masterman* (1), the Defendant is responsible, innocent though he is of any wrong, and, in fact, ignorant of the particular acts in respect of which *Parker* must be held to bind his firm, and certainly of the wrongful acts in respect of which *Parker* has behaved so ill.

That being so I must give judgment as sought for by the Plaintiffs; but with regard to the costs I ought not either to allow the costs to be paid out of the estate or to visit the Defendant with the costs of the Plaintiffs. I think there has been such laches on the part of the Plaintiffs in trusting *Parker* with these bonds, that I ought not to make any order as to costs upon this part of the claim.

Solicitors for Plaintiffs: *Burton, Yeates, & Co.*
Solicitor for Defendant: *R. A. Kelley.*

(1) Law Rep. 7 Eq. 504.

C. M.

TONE *v.* PRESTON.

DENMAN, J.

1883

July 9, 23.

[1882 T. 1007.]

Easement—Prescription—Presumption—Enjoyment as of Right.

In 1856 *A.* built on a wall belonging to *B.*, the rest of the building being on land laid out by *B.* for a street. By a deed made in 1864, *A.* covenanted with *B.* that *A.* would on three months' notice macadamise the street and keep it in repair. This deed was recited in another deed made between *A.* and *B.* in 1877, in which the proposed street was referred to. The street was never made, and the design had been abandoned:—

Held, that *A.*'s enjoyment of support from the wall was not as of right, and that no easement was acquired.

Dalton v. *Angus* (1) discussed.

In the year 1854 *Bryan Scurfield* was the owner of the *Grange* estate at *Bishopwearmouth*, and *J. C. Tone* was a builder, to some extent employed by *Scurfield* as his agent. It was then contemplated to build on part of the estate, and a back street eighteen feet wide was laid out on the plan. Along the line of the proposed back street, and bounding land of *Scurfield's* not included in the building scheme, a wall was built by *Tone*, and one of the contentions was that it either belonged to him or was a party-wall. The Court, however, held on the evidence that the wall was on *Scurfield's* land, and that *Tone* was merely the builder. *Tone*, between 1854 and 1856, on land which *Scurfield* had agreed to sell him, built some brick workshops, and he extended them over the land laid out as a back street. The gable of his workshops rested on the wall already built, and the joists of a shed built about the same time were let into and rested on the same wall. By a deed made in 1864 in pursuance of the agreement, it was witnessed that *Scurfield*, his heirs and assigns, should stand possessed in trust for *Tone* and his heirs of the piece of land comprised in the agreement for sale, and described as "bounded by land also belonging to the said *Bryan Scurfield*, and intended to be appropriated as and for a back street on the east." And the deed contained a covenant by *Tone*, and also as a separate covenant with the said *Bryan Scurfield*, "that the said *John Carr Tone*, his heirs and assigns, or the owner or owners for the time

(1) 6 App. Cas. 740.

DENMAN, J. 1883 TONE v. PRESTON.

being of the said piece of ground and premises hereby conveyed, within three calendar months next after notice in writing, from and under the directions of the said *Bryan Scurfield*, his heirs or assigns, or his or their agent for the time being, shall form, pave, and macadamise the carriage road on the north side of the plot of ground hereby conveyed, and also form and pave the said intended back street so far as the said plot of ground extends, and shall for ever hereafter keep the same road and street in good condition and repair."

By an indenture dated the 15th of July, 1861, *Scurfield* had covenanted to surrender to *T. R. Wilson* and *H. Ritson* (under whom the Defendants claimed) a piece of his land within part of the wall in question, described as "bounded by a piece of ground eighteen feet wide now in the occupation of *J. C. Tone*, and intended to be apportioned as a back street." And by an agreement dated the 29th of January, 1877, reciting the deed of 1864, *J. C. Tone* agreed to buy from *Scurfield* (amongst other things) the piece of land set out as a back street, but subject to any rights of road over the same and any right to use the same as a back street under the indenture of the 15th of July, 1861, and other indentures.

In 1882 the Defendant *Preston*, in whom the land within the wall was now vested, pulled down part of the wall on which the gable rested, and *Elizabeth Tone*, tenant for life under the will of *J. C. Tone*, on the 22nd of May, 1882, brought this action to restrain the pulling down of the wall.

Barber, Q.C., and *Byrne*, for the Plaintiff:—

The Plaintiff claims that the wall on which her building rests is her own, but if the Court is against her on that point, then she claims a right to support acquired during a period of twenty-five years: *Lemaitre* v. *Davis* (1); *Dalton* v. *Angus* (2).

Witnesses were then examined as to the ownership of the wall and other points.

Sir *A. T. Watson* (*Higgins*, Q.C., with him), for one of the Defendants:—

The wall belongs to the Defendants, and the Plaintiff has not

(1) 19 Ch. D. 281. (2) 6 App. Cas. 740.

acquired any right to support: *Gale* on Easements (1). *Tone* purchased with notice of all the facts, and his covenant still binds the land and is available by the Defendants: *Tulk* v. *Moxhay* (2); *Western* v. *MacDermott* (3). He cannot claim anything inconsistent with a road being made: *Gaved* v. *Martin* (4); *Tickle* v. *Brown* (5).

Druce, for another Defendant.

Barber, in reply:—

There has been a clear twenty-five years' enjoyment of this easement, assuming it to be one and that the wall is not the Plaintiff's. It must be inferred that when these buildings were put up permission was given: *Kinloch* v. *Nevile* (6); *Goddard* on Easements (7). The present owners of the land on the other side of the wall had no right of way when the road was laid out, and cannot compel the road to be made: *Renals* v. *Cowlishaw* (8).

Higgins, in rejoinder on *Renals* v. *Cowlishaw*.

July 23. DENMAN, J., after observing that the case raised several nice questions of fact and some difficult questions of law, and stating the facts as to the wall, came to the conclusion that *Tone* had acted merely as builder for *Scurfield*, and had built the wall for *Scurfield* to inclose the portion of the estate which was not to be built upon, and that the wall belonged then to *Scurfield* and now to the Defendants. His Lordship then stated the facts as to the building by *Tone*, and that the wall being *Scurfield's* the building of the shops and sheds was an interference with and a trespass on the wall. His Lordship then stated the deeds as above-mentioned, and observed that the covenant in the deed of 1864 was inconsistent with a claim to keep the building standing on the wall. It had been argued that there had been a building scheme under which the back street was to be made, and that all persons who came into possession under either party were parties to the

(1) 5th Ed. p. 376.
(2) 2 Ph. 774.
(3) Law Rep. 2 Ch. 72.
(4) 19 C. B. (N.S.) 732.
(5) 4 Ad. & E. 369.
(6) 6 M. & W. 795.
(7) 2nd Ed. p. 153.
(8) 9 Ch. D. 125.

DENMAN, J. 1883 TONE v. PRESTON.

scheme, so as to make it inequitable for either to do anything to interfere with that building scheme, and so to alter the intentions formed in 1854 and 1855. With reference to that question, if it had been important, his Lordship would be inclined to find that the scheme had been abandoned and that a different scheme had come into the minds of the parties, and had been acquiesced in by all, so that the original intention of having a back street made had been given up. But his Lordship did not think it necessary to form a judgment upon that point, as the document to which *Tone* himself was a party in the year 1877 put him out of Court with reference to any right on his part on this ground to claim the easement in question. His Lordship then proceeded :—

Several questions have been raised as to this alleged easement claimed as a right to rest upon this wall the gable of the building in question. I was referred to several cases as to the possibility of having such an easement as that. One was the great case of *Dalton* v. *Angus* (1), and a very curious case it is. It appears that the Lord Chancellor held that an easement of this character was within the *Prescription Act*, and I find that the learned Judge who decided *Lemaitre* v. *Davis* (2) also took that view and decided expressly that there was an easement capable of being claimed under the *Prescription Act*. The great difficulty in *Dalton* v. *Angus*, as far as I can gather from the very elaborate and full judgments given both in the Court below and in the House of Lords, seems to have been whether the easement of support claimed in that case could exist in the absence of express evidence that the person upon whom the *onus* was to be inflicted would know that his building was being subjected to such a burden ; and the great doubt in both Courts was, whether the Court could say positively, without further evidence, that the plaintiff was entitled in respect of the easement, or the case must go down for a new trial in order that it might be ascertained whether the enjoyment was *clam*, or was an easement of which the person who would have the burden was bound to take notice. That seems to have been the great contest in that case. Ultimately the House of Lords held that from the nature of things, and the facts of the case, they were not bound to send it

(1) 6 App. Cas. 740. (2) 19 Ch. D. 281.

1883

TONE v. PRESTON.

down for a new trial, for it was apparent that the easement was acquired in such a way that the party to bear the burden of it was bound to know of it; and so ultimately the plaintiff succeeded. That was a very difficult and complicated case. It was put by the Lord Chancellor on the *Prescription Act*, and by the other Judges as a case to which the old law of prescription would apply, and that in the absence of anything to shew the exact origin of the thing, user for the time would be sufficient to give the easement, provided only that the easement was one of such a nature as that the party on whom the burden was to fall was bound to take notice of it.

It appears to me that so far as that part of the case is concerned this would have been an *à fortiori* case in favour of the Plaintiff, that is to say, that this being a vertical burden no such difficulty would arise as in *Dalton* v. *Angus* (1). It would not be necessary to ask a jury the question whether the wall obviously and apparently supported the gable. And, therefore, *Dalton* v. *Angus*, being a case in which it was held that there might be such an easement, by reason of one building supporting another, would be conclusive in favour of the Plaintiff, provided that in all other respects there was an easement to which he had made out his title.

But there is another difficulty in this case. The enjoyment must not only not be *clam*, but it must also be as of right; and in this case the Court has to find from the evidence whether the party claiming the easement has had that easement as of right, or whether owing to circumstances in the case, or to any recognition by him in the course of the twenty years immediately preceding the action brought, he has so dealt as to shew that he cannot claim it as of right. Looking at it in that way, I have come to the conclusion that this is an easement which the Plaintiff has not established, because when we look at the deeds, the deed of 1864, and the deed of 1877 especially, I think that not only in writing, but by deed, the Plaintiff's predecessor in title has practically admitted that this was not an easement to which he was asserting an absolute right. It is a perfectly new case, and I can find no case in which that is to be gathered from documents which do not expressly refer to the easement itself, or

(1) 6 App. Cas. 740.

DENMAN, J. to the thing over which the easement is supposed to be acquired. But I think it impossible to say that an easement has been established where a building stands upon land as to a portion of which land the party claiming the easement admits that at any time upon three months notice he is bound to do something which is inconsistent with the continuance of the building. It is inconsistent with common sense to say that he has been during the whole of the twenty-five years insisting on that easement as of right; and though there is no authority on the subject, I think that this does bring it within the cases which shew that if any act be proved to have been done within the twenty years before action brought which is an indication that the claim is not of right, then the easement is not claimable. Many cases were cited, although I do not refer to them in detail. One was *Tickle* v. *Brown* (1), and another was *Kinloch* v *Nevile* (2), to the effect that there may be facts which shew that the thing was not as of right within the twenty years.

1883

TONE v. PRESTON.

On this ground I think that the Plaintiff has failed to make out her title, first, to the wall, and secondly, to the easement she claimed. That being so, the only result is that the action should be dismissed with costs.

Solicitors for Plaintiff: *Paterson, Snow, & Bloxam*, agents for *Ranson & Nelson, Sunderland.*

Solicitors for Defendants: *Shum, Crossman, & Co.*, agents for *F. J. McKenzie, Sunderland.*

(1) 4 Ad. & E. 369. (2) 6 M. & W. 795.

C. M.

END OF VOL. XXIV.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1883, will be as follows:—

In the First Series,
22 Ch. D.

In the Second Series,
10 Q. B. D. 8 P. D.

In the Third Series,
8 App. Cas.

INDEX.

ABSOLUTE CONVEYANCE—Right of way 572
See VENDOR AND PURCHASER. 1.

ABSOLUTE GIFT - - - - 616
See WILL. 1.

ABSOLUTE TRANSFER—Bill of sale—Order and disposition - - - 210
See BILL OF SALE.

ACT OF BANKRUPTCY - - - 339
See BANKRUPTCY. 1.

ACTIO PERSONALIS MORITUR CUM PERSONÂ—Trespass—Profit by trespasser 439
See TRESPASS.

ADJUDICATION—Bankruptcy—Power to adjudicate after liquidation petition - 35
See BANKRUPTCY. 5.

ADMINISTRATION — *Conversion — Residue — Power to postpone—Tenant for Life and Remainderman—Apportionment between Capital and Income.*] A testator died entitled to an annuity secured on the grantor's estate in land expectant on the death of his father, and also to a mortgage debt on the same estate. The testator devised his residuary estate to trustees upon trust to convert at their uncontrolled discretion, and to pay the income to his wife for life, and after her death to his children. The mortgaged estate did not fall into possession till several years after testator's death, and the arrears of the annuity and the mortgage debt were then paid:—*Held*, that the amount ought to be apportioned between capital and income, on the principle of ascertaining the amount which if put out at interest on the death of the testator at compound interest would with the accumulations have amounted on the day of payment to the sum actually paid, and the sum so ascertained should be treated as capital, and the difference between that sum and the sum actually paid should be treated as income, and paid to the tenants for life. BEAVAN *v.* BEAVAN [649, n.

2. —— *Conversion—Will—Residuary Gift—Power to postpone—Tenant for Life and Remainderman—Expectancy—Property falling in after Testator's Death—Apportionment between Capital and Income, how made—Compound Interest—Yearly Rests.*] Where a testator has bequeathed his residuary personal estate to trustees upon trust for conversion, with power to postpone such conversion at their discretion, and to hold the proceeds upon trust for a person for life with remainders over, and such residue includes outstanding personal estate, the conversion of which the trustees, in the exercise of their discretion, postpone for the benefit of the estate, and which eventually falls in some years after the testator's death—as for instance a mortgage debt with arrears of interest, or arrears of an annuity with interest, or moneys payable upon a life policy—such outstanding personal estate should, on falling in, be apportioned as between capital and income by ascertaining the sum which, put out at interest at 4 per cent. per annum on the day of the testator's death, and accumulating at compound interest calculated at that rate with yearly rests and deducting income tax, would, with the accumulations of interest, have produced, at the day of receipt, the amount actually received; and the sum so ascertained should be treated as capital, and the residue as income.—*Beavan* v. *Beavan* (24 Ch. D. 649, n.) followed. *In re* EARL OF CHESTERFIELD'S TRUSTS - - - 643

3. —— *Retainer—Real Estate—Assets—Heir-at-Law—Devisee—Specialty Debt—Simple Contract Debt—3 & 4 Will. 4, c. 104—Hinde Palmer's Act (32 & 33 Vict. c. 46).*] An heir-at-law or devisee of real estate sold by the Court under 3 & 4 Will. 4, c. 104, has no right of retainer, either out of the proceeds of sale or any rents in his hands, for a debt due to him either on simple contract or, having regard to Hinde Palmer's Act (32 & 33 Vict. c. 46), on specialty.—Observations on *Ferguson* v. *Gibson* (Law Rep. 14 Eq. 379). *In re* ILLIDGE. DAVIDSON *v.* ILLIDGE - 654

—— Option of purchasing freehold - - 199
See OPTION OF PURCHASE.

ADMINISTRATION ACTION—Deceased bankrupt
See BANKRUPTCY. 8. [672

AFFIDAVIT—Description of deponent - 271
See TRUSTEE ACTS.

AFTER-ACQUIRED PROPERTY—Settlement
See Settlement. 1. [195
—— Undischarged bankrupt - - 672
See Bankruptcy. 8.

AGENT—Bankruptcy of principal—Fraudulent transfer - - - - 339
See Bankruptcy. 1.
—— Factors Act—Lien - - - 54
See Factor.
—— Knowledge of—Interrogatories - 110
See Practice. 9.
—— Liability of—Warranty of authority 367
See Principal and Agent.

AGREEMENT—For lease - - - 624
See Lease.
—— Sale of land - - - - 572
See Vendor and Purchaser. 1.

ALTERATION—Order for production of documents—Place of production - 376
See Practice. 11.
—— Property—Restrictive covenants - 180
See Covenant.

ANGLE OF 45°—Obstruction of light - 282
See Light.

APPEAL—Bankruptcy - - - 364
See Bankruptcy. 2.
—— For costs - - - - 273
See Practice. 1.
—— Staying proceedings during - - 305
See Practice. 12.
—— Time for—Extension of time - - 488
See Practice. 2.

APPOINTMENT—Default of—Class when to be ascertained - - - - 244
See Settlement. 2.

APPORTIONMENT—Capital and income—Conversion - - - 643, 649, n.
See Administration. 1, 2.

AUCTIONEER'S CHARGES - - - 608
See Solicitor. 2.

AUTHORITY — To receive purchase-money — Solicitor - - - - 387
See Vendor and Purchaser. 4.
—— Warranty of—Measure of damages - 367
See Principal and Agent.

BANKRUPTCY—*Act of Bankruptcy—Fraudulent Transfer of Property — Payment by Agent — Liability of Agent to Trustee in Bankruptcy of Principal—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 6, *sub-s.* 2.] An agent, who, in obedience to the previous direction of his principal, pays away money of the principal which is in his hands, knowing before he makes the payment (though he did not know when he received the money) that the payment will when completed constitute an act of bankruptcy on the part of the principal, is not liable to the trustee in the subsequent bankruptcy of the principal for the money so paid away.—The trustee could recover the money from the agent only on the ground that he had paid away the money of the trustee, and in such a case the money would become the trustee's money only on the completion of the act of bankruptcy to which his title would relate back, i.e., not until after the money had left the agent's hands. *Ex parte* Helder. *In re* Lewis **C. A. 339**

BANKRUPTCY—*continued.*

2. —— *Appeal—Notice—Debtor not shewing Cause against Petition — Substituted Service — Jurisdiction—Bankruptcy Rules*, 1870, *rr.* 36, 37.] When a debtor gives no notice under rule 36 of his intention to shew cause against a bankruptcy petition, and the petition is consequently heard in his absence, and the Court refuses to make an adjudication, if the petitioning creditor desires to appeal against the refusal he must serve notice of the appeal on the debtor.—In a proper case the Court of Appeal has jurisdiction to make an order for substituted service of a notice of appeal, though no express provision to that effect is contained in the Rules of Court. *Ex parte* Warburg. *In re* Whalley - - - - **C. A. 364**

3. —— *Disclaimer by Trustee — Leasehold Interest of Bankrupt—Leave of Court—Terms to be imposed on Trustee—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 23—*Bankruptcy Rules*, 1871, *r.* 28.]. In determining whether, on giving leave to the trustee in a bankruptcy to disclaim a lease of the bankrupt, the trustee should be ordered to pay compensation to the landlord in respect of his occupation of the leasehold premises, the Court will have regard not merely to the question whether the occupation has actually produced a profit to the bankrupt's estate, but also to the question whether the possession was retained by the trustee with a view to obtaining such a profit.—The rule as laid down by Cotton, L.J., in *Ex parte Isherwood* (22 Ch. D. 384) adopted in preference to that expressed by Jessel, M.R., in *Ex parte Izard* (23 Ch. D. 115).—The imposing of conditions on the trustee is, however, a matter of judicial discretion, and the Court of Appeal will not readily interfere with the exercise of discretion by the Judge of first instance.—The Court ordered compensation to be paid by the trustee in a bankruptcy as a condition of giving him leave to disclaim the lease of the bankrupt's place of business, although during part of the time during which the trustee had been in occupation a bailiff had been in possession of the bankrupt's goods under a distress for rent, and the landlord had been allowed to place bills on the premises stating that they were to be let, and that application for that purpose was to be made to him. *Ex parte* Arnal. *In re* Witton **C. A. 26**

4. —— *Liquidation Petition—Appointment of Trustee—Lapse of more than Six Months from filing of Petition—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 6, 125, *sub-s.* 7.] A trustee can be appointed by the creditors under a liquidation petition, though more than six months have elapsed since the filing of the petition.—*Ex parte Fenning* (3 Ch. D. 455) discussed.—The last clause of sub-sect. 7 of sect. 125 relates only to the effect of the appointment of a trustee under a liquidation after he has been appointed, and does not impose on the making of the appointment any limitation similar to that which by sect. 6 is imposed on the making of an adjudication of bankruptcy, viz., that the act of bankruptcy on which the adjudication is founded must have occurred within six months before the presenta-

BANKRUPTCY—*continued.*
tion of the petition for adjudication. *Ex parte* CREDIT COMPANY. *In re* MCHENRY - C. A. 353

5. —— *Liquidation Petition—Failure to pass Resolutions—Delay—Power to adjudicate Debtor a Bankrupt—Pendency of Proceedings—Power to order fresh First Meeting of Creditors—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 125, *sub-s.* 12.] A debtor filed a liquidation petition in August, 1879. A receiver of his property was at once appointed, and injunctions were granted to restrain some of the creditors from proceeding against him for their debts. The first meeting of the creditors was held on the 20th of October, 1879, when it was resolved to adjourn to the 15th of December, 1879. Similar resolutions for adjournment were passed again and again, the meeting being ultimately, on the 15th of November, 1882, adjourned to the 28th of March, 1883. No resolutions for liquidation by arrangement or composition were passed. In January, 1883, two of the creditors applied to the Court of Bankruptcy by motion, under sub-sect. 12 of sect. 125 of the Bankruptcy Act, 1869, for an adjudication of bankruptcy against the debtor. At the adjourned meeting on the 28th of March, 1883, the creditors resolved that it was inexpedient in the interest of the creditors that any furthur proceedings should be taken under the petition, and that application should be made to the Court to discharge the receiver, and dismiss the petition, or stay all further proceedings under it. The Registrar, on the 3rd of May, made an adjudication. The debtor appealed, and on the hearing of the appeal an offer was made by a friend of his to pay the debts of the two creditors in full and to provide for their costs of the application, the payment to be made by the friend out of his own moneys, and an undertaking being given by him that neither directly nor indirectly should the payment be made out of the debtor's assets:—*Held*, that, notwithstanding the resolution of the 28th of March, and having regard to the fact that the receiver had not been discharged, the liquidation proceedings were still pending, and that if the adjudication order was discharged, no other creditor would be injured, for that the Court would have jurisdiction to adjudicate the debtor a bankrupt on the application of any other creditor.—The adjudication was accordingly discharged on the terms of payment proposed, and on the undertaking of the debtor to apply to the Court of Bankruptcy for leave to summon a fresh first meeting of the creditors.—*Held*, by Baggallay and Cotton, L.JJ., and *semble* per Bowen, L.J., that the Court had jurisdiction to order a fresh first meeting of the creditors under the petition. *Ex parte* MCHENRY. *In re* MCHENRY - C. A. 35

6. —— *Liquidation Resolutions—Registration—Locus Standi to oppose—"Creditor"—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 125—*Bankruptcy Rules*, 1870, *rr.* 67, 70, 271, 295.] Upon the hearing of an application to register liquidation resolutions no one has a locus standi to be heard in opposition but a creditor who has previously proved a debt in the mode prescribed by the rules.—A person who claims to be a creditor, and in that character to oppose the registration, cannot prove his debt when he comes before the Registrar to oppose. If he has not previously proved a debt he cannot be heard. *Ex parte* BAGSTER. *In re* BAGSTER - - C. A. 477

7. —— *Order and Disposition — Reputed Ownership—Articles not connected with Business—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 15, *sub-s.* 5.] When a trader is in possession at his place of business of articles not in their nature connected with his business, and the trustee in his bankruptcy claims the articles on the ground that the bankrupt was the reputed owner of them, much stronger evidence will be required to prove the reputed ownership than in the case of articles connected with the business, the inference from the nature of the articles being that they are not connected with the business. *Ex parte* LOVERING. *In re* MURRELL - - - - C. A. 31

8. —— *Undischarged Bankrupt — Close of Bankruptcy—After-acquired Property—Death of Bankrupt within Three Years after Close—Rights of Old Creditors—Administration Action—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 12, 15, 47, 48, 49, 54.] An undischarged bankrupt died intestate within three years after the close of his bankruptcy, having in the interval acquired fresh property and contracted fresh debts. Only a small dividend had been paid in the bankruptcy, and the bankrupt had not, after the close of the bankruptcy, made any further payments to the creditors who had proved. An action was brought by one of the new creditors to administer the bankrupt's estate. The estate was sufficient to pay the costs of the action, to pay the new creditors in full, and to leave a surplus. This surplus was claimed by the old creditors:—*Held*, that the administratrix was entitled to the surplus, and that the old creditors had no right to it.—The creditors of an undischarged bankrupt under the Act of 1869 have no rights against property acquired by him after the close of the bankruptcy, except such rights as are given to them by sect. 54, and those rights cannot be enforced after the death of the bankrupt.—Sect. 12 applies to property acquired by an undischarged bankrupt after the close of the bankruptcy as well as to property divisible among the creditors in the bankruptcy.—*Ex parte Kelly* (7 Ch. D. 161) explained. *In re* SMITH. GREEN *v.* SMITH - - 672

—— Mortgagor — Purchase of mortgage by trustee - - - - 618
See MORTGAGE. 1.

BANKRUPTCY RULES, 1870, rr. 36, 37 - 364
See BANKRUPTCY. 2.

—— *rr.* 67, 70, 271, 295 - - - 477
See BANKRUPTCY. 6.

BANKRUPTCY RULES, 1871, r. 28 - 26
See BANKRUPTCY. 3.

BILL OF COSTS—Settled Land Act - 608
See SOLICITOR. 2.

—— Taxation—Separate estate - - 405
See SOLICITOR. 1.

BILL OF SALE—"*Order and Disposition*"—*Bills of Sale Acts*, 1878 *and* 1882 (41 & 42 *Vict. c.* 31; 45 & 46 *Vict. c.* 43).] The Bills of Sale Act, 1882, repeals the 20th section of the Bills of Sale Act, 1878, in respect of bills of sale given by way of

BILL OF SALE—*continued.*
security, but not in respect of bills of sale given by way of absolute transfer, and therefore chattels comprised in a registered bill of sale given by way of absolute transfer are not in the order and disposition of the grantor with the Bankruptcy Act. SWIFT *v.* PANNELL - - - - 210

BREACH OF TRUST—Payment of purchase-money to solicitor - - - 387
See VENDOR AND PURCHASER. 4.

BROKER—Advances to agent for sale—Lien 54
See FACTOR.

BUILDING ESTATE—Restrictive covenants 180
See COVENANT.

BUILDING SOCIETY—*Withdrawal of Members—Notice of Withdrawal—Power to claim Payment "provided the funds permit"—Applicability of Rules to a Winding-up.*] One of the rules of a building society gave power to the investing members to withdraw their money, provided the funds permitted, on giving notice according to a prescribed form printed in the schedule. The society was ordered to be wound up, and the assets were insufficient to pay the investing members in full. Several of the investing members had given notice to withdraw all their money, and their notices had expired before the commencement of the winding-up, but they had not been paid. Some of them had not used the printed form of notice prescribed by the rules, but their notices had been accepted by the directors:—*Held*, that the rule as to the withdrawal of members must not be confined to the society as a going concern, but was applicable to adjust the rights of the withdrawing and continuing members inter se in the winding-up; that the members who had given notice to withdraw either in the prescribed form or otherwise, and whose notices had expired before the commencement of the winding-up, were entitled to be paid out of the assets next to the outside creditors, and in priority to the other investing members who had not given notice of withdrawal, notwithstanding that at the date of the winding-up there were no funds in hand for their payment.—Whether the members who had given notice of withdrawal but had not been paid before the commencement of the winding-up remained members of the society, *quære*. *In re* BLACKBURN AND DISTRICT BENEFIT BUILDING SOCIETY - - - - C. A. 421

BUSINESS—Articles not connected with—Order and disposition - - - 31
See BANKRUPTCY. 7.

CANCELLATION—Registration of trade-mark 504
See TRADE-MARK. 2.

CASES—*Attorney-General* v. *Swansea Improvements and Tramways Company* (9 Ch. D. 46) considered - - - 305
See PRACTICE. 12.

—— *Beavan* v. *Beavan* (24 Ch. D. 649, n.) followed - - - - 643
See ADMINISTRATION. 2.

—— *Bedford (Duke of)* v. *Trustees of the British Museum* (2 My. & K. 552) applied 180
See COVENANT.

CASES—*continued.*
—— *Belaney* v. *Ffrench* (Law Rep. 8 Ch. 918) distinguished - - - 408
See SOLICITOR. 3.

—— *Berdan* v. *Greenwood* (20 Ch. D. 764, n.) distinguished - - - - 522
See PRACTICE. 8.

—— *Bolckow* v. *Fisher* (10 Q. B. D. 161) distinguished - - - - 110
See PRACTICE. 9.

—— *Boughton* v. *Boughton* (23 Ch. D. 169) distinguished - - - - 408
See SOLICITOR. 3.

—— *Boyes* v. *Bedale* (1 H. & M. 798) observed upon - - - - 637
See WILL. 5.

—— *Brackenbury* v. *Gibbons* (2 Ch. D. 417) observed upon - - - - 633
See WILL. 4.

—— *Curnick* v. *Tucker* (Law Rep. 17 Eq. 320) commented on - - - 199
See WILL. 8.

—— *Dalton* v. *Angus* (6 App. Cas. 740) discussed - - - - 739
See SUPPORT.

—— *Delaney* v. *Delaney* (27 Sol. J. 418) distinguished - - - - 126
See PRACTICE. 3.

—— *Dobson* v. *Faithwaite* (30 Beav. 228) followed - - - - 126
See PRACTICE. 3.

—— *Dundonald (Earl of)* v. *Masterman* (Law Rep. 7 Eq. 504) referred to - 731
See PARTNERSHIP.

—— *Fenning, Ex parte* (3 Ch. D. 455) discussed
See BANKRUPTCY. 4. [353

—— *Ferguson* v. *Gibson* (Law Rep. 14 Eq. 379) observed upon - - - 654
See ADMINISTRATION. 3.

—— *Foster* v. *Great Western Railway Company* (8 Q. B. D. 25, 515) distinguished 273
See PRACTICE. 1.

—— *Gibson* v. *Fisher* (Law Rep. 5 Eq. 1) not followed - - - - 664
See WILL. 2.

—— *Goodman's Trusts, In re* (17 Ch. D. 266) observed upon - - - - 637
See WILL. 5.

—— *Hackett* v. *Baiss* (Law Rep. 20 Eq. 494) considered - - - - 282
See LIGHT.

—— *Hogg* v. *Jones* (32 Beav. 45) distinguished
See WILL. 6. [102

—— *Hutchinson and Tenant, In re* (8 Ch. D. 540) commented on - - - 199
See WILL. 8.

—— *Isherwood, Ex parte* (22 Ch. D. 384) adopted
See BANKRUPTCY. 3. [26

—— *Izard, Ex parte* (23 Ch. D. 115) not followed
See BANKRUPTCY. 3. [26

—— *Kelly, Ex parte* (7 Ch. D. 161) explained
See BANKRUPTCY. 8. [672

—— *Lambe* v. *Eames* (Law Rep. 6 Ch. 597) commented on - - - - 199
See WILL. 8.

CASES—*continued.*

—— *Lechmere and Lloyd, In re* (8 Ch. D. 524) considered - - - - 633
See WILL. 4.

—— *Le Marchant* v. *Le Marchant* (Law Rep. 18 Eq. 414) commented on - 199
See WILL. 8.

—— *Mercers' Company, Ex parte* (10 Ch. D. 481) followed - - - - 669
See PRACTICE. 5.

—— *New Callao, In re* (22 Ch. D. 484) approved
See PRACTICE. 2. [488

—— *Norton* v. *London and North Western Railway Company* (9 Ch. D. 623) considered
See RAILWAY COMPANY. [1

—— *Robinson* v. *Shepherd* (4 D. J. & S. 129) approved - - - - 664
See WILL. 2.

—— *Swindon Waterworks Company* v. *Wilts and Berks Canal Navigation Company* (Law Rep. 7 H. L. 697) considered - 1
See RAILWAY COMPANY.

—— *Uruguay Central and Hygueritas Railway Company of Monte Video* (11 Ch. D. 372) approved - - - - 259
See COMPANY. 4.

—— *Whiting to Loomes* (14 Ch. D. 822; 17 Ch. D. 10) distinguished - - - 119
See STAMPS.

—— *Wolley* v. *Jenkins* (23 Beav. 53) discussed
See SETTLED ESTATES ACT. [238

CHARGE ON DEBTS—Legal estate in executors
See WILL. 7. [190

CHARITY—Scheme—Apportionment—District parishes - - - - 213
See CHURCH BUILDING ACTS.

CHARITY COMMISSIONERS—*Vendor and Purchaser*—16 & 17 *Vict. c.* 137—18 & 19 *Vict. c.* 124, *s.* 29—5 & 6 *Will.* 4, *c.* 76—*City Ward*—*Sale*—*Consent of Charity Commissioners.*] Land purchased by one of the wards of the city of London out of the common moneys belonging to the ward, for the purpose, as declared by a deed of trust then executed, of providing a watch-house and suitable rooms for transacting the business and keeping the records of the ward, and subsequently let out on lease, may be conveyed to a railway company (requiring to take the premises under their compulsory powers) without the consent of either the Charity Commissioners under the Charitable Trusts Acts, 1853 and 1855, or the Lords of the Treasury under the Municipal Corporations Act, 1835; nor is it necessary that the sale should be completed under the provisions of the Lands Clauses Act. FINNIS AND YOUNG TO FORBES AND POCHIN. (No. 1.) - - 587

2. —— *Vendor and Purchaser—Charity wholly maintained by Voluntary Contributions*—16 & 17 *Vict. c.* 137, *s.* 62—18 & 19 *Vict. c.* 124, *ss.* 29, 48—*Consent of Charity Commissioners.*] Land purchased by one of the City wards and used for the purposes of the ward charity school, which had no endowment and was wholly maintained by voluntary contributions, is within the exceptions of the Charitable Trusts Act, 1853, s. 62, and sect. 48 of the Act of 1855, and may be sold without the

CHARITY COMMISSIONERS—*continued.*

concurrence or consent of the Charity Commissioners. FINNIS AND YOUNG TO FORBES AND POCHIN. (No. 2.) - - - - - - 591

CHEMICAL PROCESS—Equivalents - 156
See PATENT.

CHILDREN—Illegitimate—Gift to - - 691
See WILL. 3.

CHURCH BUILDING ACTS—*District Parishes—Charity—Scheme—Apportionment—Discharge of Order—Jurisdiction*—52 *Geo.* 3, *c.* 101—8 & 9 *Vict. c.* 70, *s.* 22.] Where under the Church Building Acts district parishes have been formed out of an original parish, and the Court has, under sect. 22 of the Church Building Act, 8 & 9 Vict. c. 70, made an order apportioning a charitable gift between these district parishes and the remainder of the original parish, such order is not to be treated as final, but the Court has jurisdiction to make fresh orders from time to time to meet the changing circumstances of such district parishes or original parish, either by discharging or varying former orders made under the section.—By an order made in 1852, upon a petition presented under the Church Building Act (8 & 9 Vict. c. 70), and Sir Samuel Romilly's Act (52 Geo. 3, c. 101), the Court, acting under sect. 22 of the former Act, apportioned the income of certain charities established for the benefit of the poor of the parish of K., between five district parishes, which had been formed out of that parish, and the remainder of that parish, and directed the trustees of the charities to apply the income in the specified proportions. Further district parishes having been subsequently formed out of the parish of K., one of them having had assigned to it a portion of one of the original five districts, in 1879 a scheme was settled by the Charity Commissioners appropriating the income of the charities to certain objects, the scheme also providing that the trustees of the charities were, in the application of the income, to have regard to the apportionment of 1852. It being found, owing to the changes that had taken place since the order of 1852 in the populations of the various districts constituting the parish of K., impracticable to carry out the scheme of 1879 while retaining the apportionment directed by the order of 1852, the trustees presented a petition under the above Act for the discharge of that order:—*Held*, that the Court had jurisdiction to discharge the order, which was discharged accordingly. *In re* CAMPDEN CHARITIES. (No. 2.) - - 213

CLASS—Gift to—"According to the stocks" 664
See WILL. 2.

—— Period of ascertaining—Default of appointment - - - - - 244
See SETTLEMENT. 2.

CLOSE OF BANKRUPTCY - - - 672
See BANKRUPTCY. 8.

COMPANY—*Application of Funds of Company—Directors—Ultra Vires—Winding-up Petition.*] A proviso in the articles of association of a company that the directors may "at any time direct any action or other legal proceedings to be commenced and prosecuted on behalf of the company in the name of the company or of such officer or other person as the directors may be advised; and may defend any action, &c., and may release,

COMPANY—*continued.*

discontinue, or compromise any such action or other proceeding as they shall deem expedient; and they shall be indemnified out of the funds of the company against all costs, damages, and expenses, by reason of such action, suit, or proceedings," does not authorize the application by the directors of the assets of the company in paying the costs of a petition for winding up the company presented by themselves, but opposed by a number of the shareholders and a minority of the directors, and the costs of an appeal from the dismissal of such petition; and such intended application will be restrained as an act illegal and ultrà vires. SMITH *v.* DUKE OF MANCHESTER - - - 611

2. —— *Debentures—Companies Clauses Consolidation Act*, 1845—*Irregularity in Issue—Transferee for Value without Notice—Estoppel.*] Where a company has power to issue legally transferable securities an irregularity in the issue cannot be set up against even the original holder if he has a right to presume omnia rite acta. If such securities be legally transferable such an irregularity and à fortiori any equity against the original holder, cannot be asserted by the company against a bonâ fide transferee for value without notice. Nor can such an equity be set up against an equitable transferee, whether the securities were transferable at law or not, if by the original conduct of the company in issuing the securities or by their subsequent dealing with the transferee he has a superior equity. If the original conduct of the company in issuing debentures was such that the public were justified in treating it as a representation that they were legally transferable, there would be an equity on the part of any person who had agreed for value to take a transfer of these debentures to restrain the company from pleading their invalidity, although that might be a defence at law to an action by the transferor.—A company having, subject to the conditions in the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), the power of borrowing, issued, after resolutions passed at a meeting at which an insufficient number of shareholders were present, debentures to the contractor J. B. P., who was present at the meeting and knew of the irregularities of the company.—J. B. P. transferred some of the debentures to Y., a sub-contractor, for a nominal consideration, and some to C. for value. —Y. had a bill against J. B. P., and P. discounted it and took as security a deposit of some of the debentures which had been registered in the name of J. B. P. These debentures were not transferred to P. and the transfer to Y. was not registered.—T. took a transfer of other debentures from Y. for a nominal consideration which had not been registered in the name of J. B. P., but the transfer to Y. had been registered and T. alleged that he gave value to Y. Registration of the transfer to T. was refused. He brought an action against the company for payment and for registration, but it was stopped by the winding-up. C. had a transfer for full value and registered:—*Held*, that C. had a valid claim to be paid his debentures, and that the company were estopped from setting up the irregularity in the issue of them:—*Held*, also, that P. and T. must be treated as equitable transferees only, but without reason to suspect any irregularity in the issue, and that they could be allowed to recover only such a sum as each of them might be able to prove he bonâ fide advanced upon the securities which he received. *In re* ROMFORD CANAL COMPANY. POCOCK'S CLAIM. TRICKETT'S CLAIM. CAREW'S CLAIM. - - - - - - 85

3. —— *Misrepresentation in Prospectus — Rectification of Register of Members—Notice—Delay—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 35; *Table A*, *Articles* 95, 97.] The provisions of articles 95, 97 of Table A to the Companies Act, 1862, for the service of notices by a company on its members, apply only to notices relating to the ordinary business of the company, and service in the way there pointed out is not sufficient for the purpose of fixing a shareholder with knowledge of a misrepresentation which would entitle him to repudiate his shares, unless he had been guilty of laches after notice of the misrepresentation. *In re* LONDON AND STAFFORDSHIRE FIRE INSURANCE COMPANY - - - 149

4. —— *Winding-up — Creditor's Petition — Right of Creditors to a Winding-up Order ex debito justitiæ — Companies Act*, 1862, *s.* 91.] Although as a general rule an unpaid creditor of a company which cannot pay its debts is entitled to a winding-up order, that order will not be made when it is shewn that the petitioning creditor cannot gain anything by a winding-up order, and, à fortiori, it will not be made under those circumstances if the other creditors oppose it.—*In re Uruguay Central and Hygueritas Railway Company of Monte Video* (11 Ch. D. 372) approved.—The 91st sect. of the Companies Act, 1862, is not confined to cases where a winding up order has been made, but applies also where a petition for winding-up is before the Court.—The colliery belonging to a colliery company was subject to a large mortgage payable by instalments, and all its assets had been assigned to trustees upon trust for its debenture holders, who had no present right of action against the company for the principal of their debts, which was not payable till 1885, but only for the arrears of interest, which were considerable. The colliery was not worth so much as the mortgage money, but it was worked at a profit, and the instalments of the mortgage debt were being paid, but nothing was left to pay interest to the debenture holders. There appeared, however, to be reason to think that if the business were continued, and the coal trade improved, there would be something for the debenture holders. The colliery was leasehold and liable to forfeiture if the company was wound up. A holder of debentures to a small amount presented a petition to wind up the company, the debt on the footing of which he petitioned being the arrears of interest on his debentures. A vast majority of the other debenture holders opposed the petition, and none of them supported it. Kay, J., thought the case not a proper one for making a winding-up order, but directed the petition to stand over for six months:—*Held*, on appeal, that the petition ought to be dismissed at once. *In re* CHAPEL HOUSE COLLIERY COMPANY - - - - - C. A. 259

COMPANY—*continued.*

5. —— *Winding-up—Withdrawal of Members—Payment out of "existing Moneys"—Applicability of Rules to Winding-up.*] One of the rules of a mutual loan society permitted that members who wished to withdraw should be entitled to have their money repaid, but such payments were to be made solely out of moneys existing at the time in a special fund, and they were to be repaid in rotation according to the date of their notices of withdrawal. The company being wound up:—*Held*, that the rule as to withdrawing members was only applicable to the company as a going concern, and that the members who had given notice before the winding-up had no priority of those who had given no notice. *In re* MUTUAL SOCIETY - - - - - 425, n

—— Winding-up order—Solicitor's lien on documents - - - - - 408
See SOLICITOR. 3.

COMPROMISE — Administration suit — Locke King's Act - - - - 94
See WILL. 11.

CONCURRENT ACTIONS—Staying proceedings
See PRACTICE. 13. [531

CONDITION — Disclaimer by trustee in bankruptcy - - - - 26
See BANKRUPTCY. 3.

CONDITIONS OF SALE - - - 11
See VENDOR AND PURCHASER. 2.

CONFLICT OF LAWS—Legitimacy—Bequest to children - - - - 637
See WILL. 5.

CONSENT—Charity Commissioners - 587, 591
See CHARITY COMMISSIONERS. 1, 2.

—— Sale of land—Settled Land Act - 144
See SETTLED LAND ACT. 7.

CONTINGENT INTEREST—Heirlooms—Vesting
See WILL. 6. [102

—— Tenant for life—Settled Land Act - 114
See SETTLED LAND ACT. 4.

CONTINGENT REMAINDER - - 633
See WILL. 4.

CONTRACT—To take shares—Agent's authority
See PRINCIPAL AND AGENT. [367

CONTRIBUTION—Co-sureties - - 709
See PRINCIPAL AND SURETY.

CONVERSION—Trust for—Apportionment
See ADMINISTRATION. 1, 2. [643, 649, n.

CONVEYANCE—In absolute terms - - 572
See VENDOR AND PURCHASER. 1.

COSTS—Appeal for - - - - 273
See PRACTICE. 1.

—— Cross-examination on affidavits - 606
See PRACTICE. 4.

—— Discretion of Court—Compulsory purchase
See PRACTICE. 5. [669

—— Exhibits to affidavits—Perusal by solicitor
See PRACTICE. 7. [684

—— Higher or lower scale - - - 594
See PRACTICE. 6.

—— Lands Clauses Act - - - 569
See LANDS CLAUSES ACT. 2.

COSTS—*continued.*

—— Lands Clauses Act—Petition - - 119
See STAMPS.

—— Taxation - - - - - 405
See SOLICITOR. 1.

—— Trade-mark—Infringement—Innocent consignee - - - - 231
See TRADE-MARK. 1.

CO-SURETY—Contribution - - - 709
See PRINCIPAL AND SURETY.

COVENANT—*Building Estate—Mutual Restrictive Covenants—Alteration of Character of Property—Breach of Covenant—Injunction.*] A building estate was laid out in lots, which were sold by the owners of the estate to different purchasers, each of whom covenanted with the vendors, and with the owners of the other lots entitled to the benefit of the covenant, not to build a shop on his land, or to use his house as a shop, or to carry on any trade therein. The purchaser of one of the lots, who occupied his house as a private residence, brought an action against the purchaser of another lot, who was using his house as a beershop with an "off" license, to restrain him from breaking his covenant, and for damages. The Defendant had to the knowledge of the Plaintiff so used his house for three years before the action was commenced. There was evidence that several other houses built on others of the lots (one of them immediately opposite the Plaintiff's house), had been for some time used as shops, notwithstanding the covenant, and that many of the houses adjoining the Plaintiff's house were occupied, not each by a single tenant, but each by two families at weekly rents:—*Held*, that the character of the property had become so changed that the original purpose—the keeping the estate as a residential property—for which the covenant had been entered into, had failed, and that it would under the circumstances be inequitable to to enforce the specific performance of the covenant.—The principle of *Duke of Bedford* v. *Trustees of the British Museum* (2 My. & K. 552) applied.—And, the Plaintiff not having proved any substantial damage, the action was dismissed with costs. SAYERS *v.* COLLYER - - - - 180

CREDITOR—Opposition to registration of liquidation resolutions - - - 477
See BANKRUPTCY. 6.

—— Winding-up petition - - - 259
See COMPANY. 4.

CROSS-ACTIONS—Staying proceedings - 531
See PRACTICE. 13.

CROSS-EXAMINATION — Affidavit — Costs of deponent - - - - 606
See PRACTICE. 4.

CROWN—Lands Clauses Act—Claim for purchase money - - - - 253
See LANDS CLAUSES ACT. 1.

CUSTODY—Infant - - - - 317
See INFANT.

DAMAGES—Measure of—Warranty of authority
See PRINCIPAL AND AGENT. [367

DEBENTURE—Irregularity of issue—Estoppel
See COMPANY. 2. [85

DELAY—Rectification of register - - 149
See Company. 3.
DEPOSIT OF BONDS—Solicitor—Liability of partner - - - - 731
See Partnership.
DIRECTORS—Application of funds—Ultra vires act - - - - - 611
See Company. 1.
DISCLAIMER—Trustee in bankruptcy - 26
See Bankruptcy. 3.
DISCRETION OF COURT—Costs—Compulsory purchase - - - - 669
See Practice. 5.
DISTRICT PARISHES—Apportionment of charities - - - - - 213
See Church Building Acts.
DOCUMENTS—Lien on—Solicitor - - 408
See Solicitor. 3.
—— Production of - - - - 376
See Practice. 11.
DOMICIL—Legitimacy—Will - - 637
See Will. 5.
DWELLING-HOUSE—Separate estate - 346
See Husband and Wife. 1.

EASEMENT—Light—Angle of 45° - 282
See Light.
—— Light—Railway company—Injunction 1
See Railway Company.
—— Support - - - - - 739
See Support.
EQUIVALENT—Chemical process - - 156
See Patent.
ESTOPPEL—Issue of debentures—Irregularity 85
See Company. 2.
EVIDENCE—Commission to examine witnesses
See Practice. 8. [522
EXECUTOR—Charge of debts—Legal estate 190
See Will. 7.
EXECUTORY DEVISE - - - 633
See Will. 4.
EXECUTORY LIMITATION—Powers of tenant for life—Settled Land Act - 114
See Settled Land Act. 4.
EXHIBITS—Costs of—Perusal - - 684
See Practice. 7.
EXPERT—Advice to Court - - - 156
See Patent.

FACTOR—*Principal and Agent—Advances by Brokers to Agent for Sale—Antecedent Debt—Factors Act*, 5 & 6 *Vict. c.* 39.] K., in Singapore, was in the habit of consigning goods to M. in London for sale. M. employed L. and P., London brokers, in the sale of these goods, and in other extensive sales and purchases, and died in May, 1880, heavily indebted to them on the balance of his account. Shortly before M.'s death K. had consigned cargoes to M. by several different ships. M. put them in the hands of L. and P. for sale, and pledged to them the several bills of lading for separate advances made by them to him on the respective cargoes. As between K. and M. these

FACTOR—*continued.*
pledges were unauthorized and improper; but L. and P. had no notice of any impropriety. One cargo had been sold before M.'s death, but not delivered nor paid for. The others remained unsold at his death, and were not sold until after the commencement of an action by K. to recover them. L. and P. claimed a general lien on the balances of the proceeds of all the cargoes after repayment of the specific advances, resting their claim on an alleged agreement with M. to that effect and on mercantile usage:—*Held*, by the Court of Appeal, that neither such agreement nor such usage was established in evidence, and that if they had been, such a general lien could not be claimed under the Factors Act:—*Held*, that apart from the Factors Act, K., an undisclosed foreign principal, could not sue L. and P. for the proceeds of goods properly sold by them in M.'s lifetime, or, if he could, he could only sue as representing M., and subject to all rights of set-off available against M., and that therefore L. and P. were entitled to a lien on the balance of the proceeds of the sold cargo, although it was not delivered or paid for in M.'s lifetime:—But *held*, that as regards the goods unsold at M.'s death, K. was entitled to them subject only to the payment of the sums for which they were respectively specifically pledged.—L. and P. bought goods for M., not disclosing the fact that they bought as agents, and were therefore as between them and the vendors personally liable to pay. On the day before the day of payment M. asked L. and P. to make him an advance on the security of one of K.'s cargoes, to enable them to pay for those goods. L. and P. did so, and the goods were thus paid for through L. and P. They knew that the cargo pledged did not belong to M., but nothing further; and they did not know whether the goods bought by M. were bought on his own account or not:—*Held*, that as M. was not at the time of the advance indebted to L. and P. in respect of the goods bought, though they were sureties for the payment, the pledge was not a pledge to secure an antecedent debt within the meaning of 5 & 6 Vict. c. 39, s. 3, and was valid, there being nothing in the circumstances to give them notice that M. was violating his duty to his principal. Kaltenbach *v.* Lewis - - - - - C. A. 54

FIDUCIARY POSITION—Mortgagee—Power of sale - - - - - 289
See Mortgage. 3.
FORECLOSURE—Infant mortgagor - 707
See Mortgage. 2.
FOREIGN ACTION—Staying proceedings 531
See Practice. 13.
FOREIGN PROBATE—Payment out of Court
See Practice. 10. [177
FRAUD—Charge of—Trial of action - 727
See Practice. 14.
FRAUDULENT TRANSFER—Act of bankruptcy
See Bankruptcy. 1. [339
FRESH FIRST MEETING—Liquidation - 35
See Bankruptcy. 5.

HEIR-AT-LAW—Right of retainer - - 654
See Administration. 3.

HEIRLOOM—Contingent future interest—Vesting - - - - - 102
See WILL. 6.

HIGHER OR LOWER SCALE—Costs - 594
See PRACTICE. 6.

HUSBAND AND WIFE—*House settled to Separate Use of Wife—Proceedings for Judicial Separation—Husband claiming proprietary Right to House—Interim Injunction.*] On a marriage a leasehold house was settled upon the usual trusts for the wife for life, for her separate use, and the husband and wife continued to reside in the house. Differences arose between them, they ceased to cohabit, and the wife instituted proceedings for divorce or judicial separation. The husband claimed the right to go to and to use the house when and as he thought fit, not for the purpose of consorting with his wife, but for his own purposes. In an action by the wife against the trustees and her husband claiming administration of the trusts of the settlement and an injunction to restrain the husband from entering the house:—*Held*, that, under the circumstances, the wife was entitled to an interim injunction. SYMONDS *v.* HALLETT [C. A. 346

2. —— *Unity of Person—Will—Gift to Husband and Wife and Third Person—Married Woman—Separate Use—Married Women's Property Act*, 1882.] Having regard to the Married Women's Property Act, 1882, the old rule of law that husband and wife were for most purposes one person, so that under a gift by will to a husband and wife and a third person the husband and wife took only one moiety between them, the third person taking the other moiety, is no longer applicable to such a gift under a will that has come into operation since the commencement of that Act.—A testatrix, by her will dated in 1880, gave her residuary personal estate "to C. J. M. and J. H. and E. his wife to and for their own use and benefit absolutely"; and appointed "C. J. M. and J. H. and E. H. his wife" her executors.—The testatrix died in 1883, after the commencement of the Married Women's Property Act, 1882. J. H. and E. H. married in 1864:—*Held*, that the residuary personal estate was divisible in thirds and not in moieties, and that E. H. took one-third for her separate use. *In re* MARCH. MANDER *v.* HARRIS - - - - - 222

—— Post-nuptial settlement—Wife's separate estate - - - - 597
See VOLUNTARY SETTLEMENT.

—— Separate estate—Bills of costs - 405
See SOLICITOR. 1.

—— Settlement—After-acquired property 114
See SETTLED LAND ACT. 4.

ILLEGITIMATE CHILDREN—Child of deceased person - - - - 691
See WILL. 3.

—— Domicil - - - - - 637
See WILL. 5.

INFANT—*Ward of Court—Infant above the age of Sixteen—Years of Discretion—Paternal Authority—Free Access to and by Mother restricted—Jurisdiction of Court*—12 *Car.* 2, *c.* 24.] A father has a legal right to control and direct the education and bringing up of his children until they attain the age of twenty-one years, even although they are wards of Court, and the Court will not interfere with him in the exercise of his paternal authority, except (1) where by his gross moral turpitude he forfeits his rights, or (2) where he has by his conduct abdicated his paternal authority, or (3) where he seeks to remove his children, being wards of Court, out of the jurisdiction without the consent of the Court.—A father put restrictions on the intercourse between his daughter in her seventeenth year, who was a ward of Court, and her mother, on the plea that he believed the mother would alienate the daughter's affections from him. The Court refused to interfere. *In re* AGAR-ELLIS. AGAR-ELLIS *v.* LASCELLES C. A. 317

—— Mortgagor—Foreclosure - - 707
See MORTGAGE. 2.

—— Property of—Solicitor's lien - - 545
See SOLICITOR. 4.

—— Tenant for life—Settled Land Act - 114
See SETTLED LAND ACT. 4.

—— Tenant in tail—Settled Land Act - 129
See SETTLED LAND ACT. 6.

INFRINGEMENT—Trade-mark - - 231
See TRADE-MARK. 1.

INJUNCTION—Husband and wife—Separate estate—Dwelling-house - - 346
See HUSBAND AND WIFE. 1.

—— Interference with light—Window overlooking railway - - - - 1
See RAILWAY COMPANY.

—— Obstruction of light - - - 282
See LIGHT.

—— Restrictive covenants—Alteration of property - - - - 180
See COVENANT.

—— Sale by mortgagee - - - 289
See MORTGAGE. 3.

—— Sale with consent of tenant for life - 558
See SETTLEMENT. 4.

INTEREST — Compound — Administration of estate—Conversion - - 643, 649, n.
See ADMINISTRATION. 1.

—— Legacy - - - - - 616
See WILL. 1.

INTERLOCUTORY INJUNCTION—Light—Window overlooking railway - - 1
See RAILWAY COMPANY.

INTERROGATORIES - - - 110
See PRACTICE. 9.

INVALIDITY—Patent—Principle—Process 156
See PATENT.

IRREGULARITY—Issue of debentures—Estoppel
See COMPANY. 2. [85

JUDGMENT—Form of—Obstruction of light 282
See LIGHT.

JUDICIAL SEPARATION — Separate estate—Dwelling-house - - - 346
See HUSBAND AND WIFE. 1.

JURISDICTION — Bankruptcy—Substituted service of appeal - - - 364
See BANKRUPTCY. 2.

JURISDICTION—*continued.*
—— Church Building Acts - - - 213
See Church Building Acts.
—— Lancaster Court—Service - - 280
See Lancaster Court.
—— Partition suit - - - - 622
See Partition Suit.

KNOWLEDGE OF SERVANT—Interrogatories—Sufficiency - - - - 110
See Practice. 9.

LANCASTER COURT—*Court of Chancery of County Palatine of Lancaster—Service out of Jurisdiction*—17 & 18 *Vict. c.* 82, *s.* 8.] Where the sole Defendant to an action commenced in the Chancery Court of the County Palatine of Lancaster is resident out of the jurisdiction of that Court, leave to serve the writ of summons upon him out of the jurisdiction, if it can be granted at all (as to which *quære*), will only be granted under very special circumstances. *In re* Watmough. Sergenson *v.* Beloe - C. A. 280

—— Rehearing—Jurisdiction - - 488
See Practice. 2.

LANDS CLAUSES ACT, 1845 (8 & 9 *Vict. c.* 18), *s.* 76—*Purchase-money paid into Court—Adverse Claimants—Claim of the Crown.*] A railway company under the powers of its Act gave notice to a lord of the manor to take a piece of land on the sea-shore, which he claimed as part of the waste of his manor. The purchase-money was assessed by arbitration, but an adverse claim having been made by the Crown, the company paid the purchase-money into Court under the 76th section of the Lands Clauses Act. The Crown filed an information against the lord of the manor claiming the land together with other land as part of the foreshore. The lord of the manor having filed a petition for payment of the purchase-money to him:—*Held* (affirming the decree of Kay, J.), that as the Crown could not be brought before the Court under the Lands Clauses Act to contest the claim of the Petitioner, the petition ought to stand over till the information had been heard.—*Quære* as to the course which ought to have been pursued if the rival claimant had been a subject. *In re* Manor of Lowestoft and Great Eastern Railway Company. *Ex parte* Reeve - - C. A. 253

2. —— *Sect.* 80—*Purchase of Land—Payment out of Court—Costs of Incumbrancers.*] After payment into Court by a company of the purchase-money of land belonging to a tenant for life and remaindermen, some of the latter mortgaged their reversionary interests in the fund.—Upon the death of the tenant for life, the owners of the fund and their incumbrancers presented a petition for payment of the fund out of Court:—*Held*, that the company were not liable to pay the costs incurred by the mortgagees in proving their incumbrances. *Ex parte* Great Western Railway Company. *In re* Gough's Trusts - 569

—— Compulsory purchase—Unstamped deed 119
See Stamps.

LEASE—*Will—Power to lease—Building Leases—Ordinary Leases—Invalid Lease—Deviation from Terms of Power—Contract for Grant of valid Lease under* 12 & 13 *Vict. c.* 26—*Option to purchase.*] A testator by his will devised and bequeathed freehold and leasehold lands upon trusts, and empowered the trustees to contract for leases thereof with or without optional powers of purchase in the lessees, and to grant leases thereof either for building or other purposes, so that no lease of the site of a building should be made for more than ninety-nine years, and no lease for any other purpose for more than twenty-one years, and so that while leases for twenty-one years were to be at the best rents which could be obtained, building leases might be at a rent to increase progressively. After the testator's death the trustees granted to A. B. a lease of part of the freehold and leasehold lands of the testator for thirty-five years, with an option to purchase during the first twenty-one years of the term, and at an increasing rent as to the freehold part, by an indenture which recited that they had power to grant building leases, but contained no covenant to build, though it contained covenants to repair, amend, and keep, and to insure all messuages erected or to be erected on the land demised.—A. B. exercised his option to purchase as to a leasehold portion of the demised property, which was duly assigned to him, and he afterwards sold and assigned part of those leaseholds to C. D. C. D. contracted to sell to a purchaser, and in order to avoid any question as to the validity of the lease by the trustees, a memorandum was indorsed upon it signed by A. B. and the trustees declaring that pursuant to the Act 12 & 13 Vict. c. 26, the lease should be considered in equity as a contract for the grant of a valid lease for twenty-one years. The purchaser, however, took the objection that the lease was invalid.—Upon a summons taken out under the Vendor and Purchaser Act of 1874:—*Held*, that the lease though intended to be a building lease was invalid as such, owing to the absence of any covenant to build, and that being bad as a building lease under the power it could not by the operation of 12 & 13 Vict. c. 26, be turned into a contract for the grant of a valid lease of a kind different from that which it was originally intended to be; moreover, that even if it could by this means be turned into an ordinary lease, it would be bad as such, inasmuch as the rent reserved on the freehold part was an increasing rent, which was not authorized by the power to grant ordinary leases:—*Held*, also, that as there was no power to grant an option to purchase otherwise than in a valid lease under the power, and the lease granted was invalid, the option to purchase must fall with the lease. Hallett to Martin - - - - - 624

—— Option of purchasing freehold—Real and personal representatives - - - 199
See Option of Purchase.

LEASEHOLD—Disclaimer—Bankruptcy - 26
See Bankruptcy. 3.

LEAVE OF COURT—Disclaimer—Bankruptcy 26
See Bankruptcy. 3.

LEGAL ESTATE—Charge of debts—Executors
See Will. 7. [190

LEGITIMACY—Domicil—Will - - 637
See WILL. 5.

LIEN—Factors Act - - - - 54
See FACTOR.

—— Solicitor - - - - 408, 545
See SOLICITOR. 3, 4.

—— Vendor—Devise of estate—Locke King's Act - - - - - 94
See WILL. 11.

LIFE INSURANCE—Right to policy moneys—Sureties - - - - 709
See PRINCIPAL AND SURETY.

LIGHT—*Obstruction—Angle of* 45°—*Injunction—Form of Judgment.*] There is no conclusion of law that a building will not obstruct the light coming to a window if it permits the light to fall on the window at an angle of not less than 45° from the vertical. The question of the amount of obstruction is always a question of fact which depends on the evidence in each case. Therefore a Plaintiff whose ancient light is obstructed is entitled to a judgment in general terms, without referring to the angle of incidence of the light, unless there is some special evidence justifying the insertion of such a clause.—*Hackett* v. *Baiss* (Law Rep. 20 Eq. 494) considered. PARKER *v.* FIRST AVENUE HOTEL COMPANY - C. A. 282

—— Window overlooking railway—Acquisition of easement—Injunction - - 1
See RAILWAY COMPANY.

LIMITED OWNER—Settled Land Act - 583
See SETTLED LAND ACT. 5.

LIQUIDATION - - - 35, 353, 477
See BANKRUPTCY. 4, 5, 6.

LOCKE KING'S ACT - - - 94
See WILL. 11.

LUNATIC—New trustee—Deceased lunatic 271
See TRUSTEE ACTS.

MARRIED WOMEN'S PROPERTY ACT—Covenant to settle - - - 195
See SETTLEMENT. 1.

—— Gift to husband and wife - - 222
See HUSBAND AND WIFE. 2.

MEASURE OF DAMAGES—Warranty of authority - - - - - 367
See PRINCIPAL AND AGENT.

MEETING OF CREDITORS—Liquidation 35
See BANKRUPTCY. 5.

MINING LEASE—Settled Land Act - 129
See SETTLED LAND ACT. 6.

MISLEADING CONDITIONS OF SALE - 11
See VENDOR AND PURCHASER. 2.

MISREPRESENTATION IN PROSPECTUS 149
See COMPANY. 3.

MORTGAGE—*Bankruptcy of Mortgagor—Purchase by Trustee in Bankruptcy of Mortgaged Estate—Right of Second Mortgagee.*] A trustee in bankruptcy does not by purchasing from the first mortgagee of the bankrupt extinguish the first mortgage, and make the second mortgagee the first incumbrancer on the estate.—But such a purchase does not extinguish the right of the second mortgagee to redeem. BELL *v.* SUNDERLAND BUILDING SOCIETY - - - 618

MORTGAGE—*continued.*

2. —— *Foreclosure Action—Infant—Immediate Foreclosure Judgment Absolute against Infant.*] Judgment for an immediate foreclosure absolute against an infant granted, the Plaintiffs offering to pay the Defendant's costs of the action as between solicitor and client, and the Defendant's counsel not asking for liberty to redeem, or that an account should be taken of what was due to the Plaintiffs, upon the Court being satisfied by evidence that the value of the property was not sufficient to pay the amount of the principal sum due on the mortgage, together with interest and the costs of the action, and that it would be for the benefit of the infant to give judgment in that form. WOLVERHAMPTON AND STAFFORDSHIRE BANKING COMPANY *v.* GEORGE - - 707

3. —— *Power of Sale—Injunction to restrain Sale by Mortgagee—Payment of Money into Court—Mortgagee in fiduciary Position—Solicitor and Client.*] The ordinary rule that the Court will not grant an interlocutory injunction restraining a mortgagee from exercising his power of sale except on the terms of the mortgagor paying into Court the sum sworn by the mortgagee to be due for principal, interest, and costs, does not apply to a case where the mortgagee at the time of taking the mortgage was the solicitor of the mortgagor. In such a case the Court will look to all the circumstances of the case, and will make such order as will save the mortgagor from oppression without injuring the security of the mortgagee.—The Plaintiff was a lady who was entitled to a life interest in leasehold property which she had mortgaged to various persons. The Defendant acted as her solicitor, and with her sanction in order to release her from embarrassment bought up several of the incumbrances with his own money and took a transfer of them to himself; having previously taken a mortgage of the life interest to secure his past costs and the costs which he might incur in paying off the incumbrances. Afterwards the Plaintiff discharged the Defendant, and employed another solicitor, who applied to the Defendant for information respecting the securities transferred. The Defendant refused to give this information unless the payment of what was due to him was guaranteed, and threatened to proceed to a sale of the property. The Plaintiff then brought an action to impeach the securities and to restrain the sale of the property, and moved for an injunction till the hearing:—*Held*, that considering all the circumstances, an injunction ought to be granted, on the Plaintiff paying into Court such a sum as the Court considered would cover the amount actually advanced by the Defendant, and amending the writ so as to make it a simple action for redemption and injunction. MACLEOD *v.* JONES - - C. A. 289

NEW TRUSTEES—Appointment of—Conveyancing Act, 1881 - - - 698
See SETTLEMENT. 2.

—— Appointment of—Settled Land Act [485, 662, 717
See SETTLED LAND ACT. 1, 2, 3.

—— Trustee Act—Lunatic - - - 271
See TRUSTEE ACTS.

NEW ZEALAND—Probate in—Payment out of Court - - - - 177
See Practice. 10.
NOTICE—Appeal—Bankruptcy - - 364
See Bankruptcy. 2.
—— Service on shareholders—Misrepresentation
See Company. 3. [149
—— Trust—Recitals in deed - - 720
See Vendor and Purchaser. 3.
—— Withdrawal of members—Building society
See Building Society. [421
—— Withdrawal of members—Mutual loan society - - - 425, n.
See Company. 5.

OPTION OF PURCHASE—*Lease—Option to purchase Fee Simple—Nature of Interest conferred on Lessee—Real and Personal Representatives.*] A lease of land contained a covenant by the lessor with the lessee, his executors, administrators, and assigns, that if the lessee, his executors, administrators, or assigns, should at any time thereafter be desirous of purchasing the fee simple of the demised land, and should give notice in writing to the lessor, his heirs and assigns, then the lessor, his heirs or assigns, would accept £1200 for the purchase of the fee simple, and on receipt thereof would convey the fee simple to the lessee, his heirs or assigns, or as he or they should direct. The lessee died intestate, and nearly twenty years after his death, his heir, who was also administrator of his personal estate, called on the devisee of the lessor to convey the fee simple to him in accordance with the covenant, and a conveyance was executed accordingly. The heir afterwards contracted to sell part of the property thus conveyed to him:—*Held*, that the option to purchase was attached to the lease and passed with it; that it consequently passed as part of the lessee's personal estate to the administrator, and that the administrator could not make a good title to the purchaser, unless the next-of-kin of the lessee would concur in the sale. *In re* Adams and the Kensington Vestry - - - - 199

—— Invalid lease - - - - 624
See Lease.
ORDER AND DISPOSITION - - 31
See Bankruptcy. 7.
—— Bill of sale - - - - 210
See Bill of Sale.

PARISH—Apportionment of charity - 213
See Church Building Acts.

PARTITION SUIT—*Jurisdiction—Power of Sale.*] A decree for the partition of property can be granted notwithstanding the existence of a power given to trustees to sell the property for the purpose of a division. Boyd *v.* Allen - 622

PARTNERSHIP—*Solicitors—Deposit of Bonds—Liability of Partner.*] Trustees deposited with a solicitor certain bonds payable to bearer. His partner had no actual knowledge of this, but letters referring to the bonds were charged for in bills of costs delivered by the firm; letters referring to the bonds were also copied into the letter book of the firm; and cheques for money received as interest on the bonds were drawn on the account of the firm.—The solicitor made away with the bonds:—*Held*, that under the circumstances his partner was liable.—*Earl of Dundonald* v. *Masterman* (Law Rep. 7 Eq. 504) referred to. Cleather *v.* Twisden - - - - - 731

—— Acting executor of deceased partner—Costs of appeal - - - - 273
See Practice. 1.

PATENT—*Chemical Process—Invalidity and Infringement—Scientific Expert to advise the Court—Secret Process—Known Chemical Equivalents—Production of similar Result.*] In an action to restrain the infringement of a patent for producing colouring matters for dyeing and printing by means of a chemical process, described in the specification, there being two questions raised, viz., validity of the patent and infringement:—*Held*, as to validity, that a man cannot have a patent for a principle alone, but may have one for a principle coupled with a process by which the principle may be carried into effect.—He can only claim to work out his process by means of materials known at the date of the patent; he cannot claim the use of materials discovered subsequently, and his specification will be construed with regard to this consideration.—Where there is contradictory evidence on a scientific question, the Court is at liberty to employ independent expert evidence to give advice upon which the Court may form its judgment.—The Court being of opinion that the Plaintiffs' principle was new, that the process was sufficiently described, and that it was workable for commercial purposes:—*Held*, that the patent was valid.—On the question of infringement the Defendant alleged that in the manufacture of his dyes he used a secret process entirely different from that of the Plaintiffs, and he was allowed to decline answering any questions in cross-examination which would disclose his secret process.—In the course of the arguments the Court being of opinion that the patent was valid, gave the Defendant leave to state his secret process in camerâ, and—*Held*, that where a patent is for a process arriving at a known result any person may use another process without its being an infringement; but where the patent is for a new result, coupled with an effectual process, the patentee is protected from the use of any other process for the same result. The Defendant had not invented new materials but had used the same materials and arrived at a similar result, though by a process different from that of the Plaintiffs and not known at the date of the patent, and this was an infringement.—The short-hand writer's notes, which would disclose the secret process, were ordered to be impounded in Court, with liberty to apply. Badische Anilin und Soda Fabrik *v.* Levinstein - - - - - 156

PAYMENT OUT OF COURT—Costs—Compulsory purchase - - - - 669
See Practice. 5.
—— Lands Clauses Act - - 253, 569
See Lands Clauses Act. 1, 2.
—— New Zealand—Probate - - 177
See Practice. 10.
—— Settled Land Act - - 662, 717
See Settled Land Act. 2, 3.

PENDING ACTION—Appointment of new trustees - - - - - 558
See Settlement. 4.
PENDING PROCEEDINGS—Liquidation—Adjudication of bankruptcy - - 35
See Bankruptcy. 5.
PER STIRPES—"According to the stocks" 664
See Will. 2.
PETITION—Liquidation - - - 35
See Bankruptcy. 5.
—— Settled Estates Act—Persons to present 238
See Settled Estates Act.
—— Winding-up - - - - 259
See Company. 4.
PLAINTIFF—Death of—Revivor - - 126
See Practice. 3.
POLICY OF INSURANCE—Co-sureties - 709
See Principal and Surety.
POST-NUPTIAL SETTLEMENT - - 597
See Voluntary Settlement.
POWER—Default of appointment - - 244
See Settlement. 2.
—— Of leasing—Building lease—Deviation from power - - - - 624
See Lease.
—— Of sale—Mortgage—Injunction - 289
See Mortgage. 3.
—— Of sale—Settlement—Injunction - 558
See Settlement. 4.
—— Of sale—Partition suit—Jurisdiction 622
See Partition Suit.
—— Of sale—Settled Land Act - 14, 129, [583
See Settled Land Act. 4, 5, 6.
—— To appoint new trustees - - 698
See Settlement. 3.

PRACTICE—*Appeal for Costs—Partnership Suit—Costs of unsuccessful Claim—Rules of Court*, 1875, *Order* LV., *r.* 1.] By articles of partnership between three partners, on the death of any partner the survivors were entitled to take his share at a valuation. One of the partners having died, his executrix brought her action to have it declared that the goodwill was to be included in the valuation, and to have the value of the deceased partner's share in the assets ascertained. A decree was made declaring that the goodwill must be valued as part of the assets, and directing accounts. The Chief Clerk made his general certificate, finding (inter alia) that two specified leaseholds belonging to the partnership were of no value. The Plaintiff took out a summons to vary the certificate by estimating these leaseholds as worth a considerable sum. The summons was adjourned into Court, and Bacon, V.C., refused to vary the certificate, but ordered the costs of both parties to be paid out of the estate. The Defendants appealed:—*Held*, that the case did not come within the rule in *Foster* v. *Great Western Railway Company* (8 Q. B. D. 25, 515) that the Court cannot make a successful defendant pay the costs of a plaintiff who has wholly failed; but that it was within the discretion of the Court to order all costs reasonably incurred in ascertaining the fund to be paid out of the fund, and that an appeal would not lie. Butcher *v.* Pooler C. A. 273

2. —— *Appeal—Extension of Time for Appeal*

PRACTICE—*continued.*

—Special Grounds—Company—Order on Winding-up Petition—Rules of Supreme Court, 1875, *Order* LVIII. *r.* 15—*Lancaster Court—Power of Rehearing — Transfer of Shares to escape Liability.*] The shareholders in a company passed an extraordinary resolution to wind up the company voluntarily, but the resolution was void, the majority of members who voted not being entitled to vote. A creditor filed a petition in the Chancery Court of the Duchy of Lancaster for a supervision order or for a compulsory winding-up order, and as the Court and the Petitioner were ignorant of the fact that the resolution was invalid, a supervision order was made. Five months afterwards the Petitioner discovered the invalidity of the resolution, and then moved before the Vice-Chancellor that the supervision order might be discharged, and a compulsory winding-up order made. This motion having been refused by the Vice-Chancellor on the ground of want of jurisdiction to rehear the petition, the Petitioner appealed from the refusal of the motion, and also applied to the Court of Appeal for leave to appeal against the original order notwithstanding the lapse of time.—The application for leave to appeal was opposed by the executors of a previous member, who had transferred their testator's shares to escape liability less than twelve months before the presenting of the original petition, but more than twelve months before the case came before the Court of Appeal, on the ground that if an order were now made on the original petition they would be made liable under the 38th section of the Companies Act, 1862:—*Held*, that leave to appeal, notwithstanding the lapse of time, ought to be given, the mistake as to the validity of the resolution forming a special ground for the application, and the Respondents having no equity to resist it.—Observations on the principle on which the Court grants extension of time for appeal.—*In re New Callao* (22 Ch. D. 484) approved. —*Semble*, the Vice-Chancellor had no power to rehear the petition himself. *In re* Manchester Economic Building Society - - C. A. 488

3. —— *Change of Parties—Revivor—Death of sole Plaintiff—Order of Course—Person attending Proceedings—Rules of Court*, 1875, *Order* L.] A person served with notice of an administration judgment, and having obtained liberty to attend the proceedings under it, is in the same position as a party to the action, and is entitled to obtain an order of course to revive the action on the death of the sole plaintiff.—*Delaney* v. *Delaney* (27 Sol. J. 418) distinguished.—*Dobson* v. *Faithwaite* (30 Beav. 228) followed. Burstall *v.* Fearon [126

4. —— *Costs—Affidavit—Rules of Court*, 1875, *Order* XXXVIII., *r.* 4—*Cross-examination.*] The direction in Rules of Court, 1875, Order XXXVIII., rule 4, that the party producing deponents for cross-examination upon their affidavits is liable in the first instance for the expenses of their attendance, is not confined to a cross-examination of the deponents before the Court at the trial of the action, but applies also to a cross-examination in proceedings before the Chief Clerk in Chambers, or before a special examiner. *In re* Knight. Knight *v.* Gardner - - - - 606

PRACTICE—*continued.*

5. —— *Costs—Payment out of Court—Company—Compulsory Purchase of Land—Owner under Disability—Discretion of Court—Rules of Court*, 1875, *Order* LV.] When the purchase-money of land, taken by a company under compulsory powers conferred on them by a special Act passed before the Judicature Act, has been paid into Court by reason of the disability of the person entitled to the land, the Court has, under the general discretion as to costs given to it by Order LV., power to order the company to pay the costs of a petition for payment of the money out to a person absolutely entitled, even though the special Act contains no provision to that effect. *—Ex parte Mercers' Company* (10 Ch. D. 481) followed. *In re* Lee and Hemingway - 669

6. —— *Costs—Taxation—Higher or Lower Scale—Rules of Supreme Court (Costs), August*, 1875, *Order VI.*] In an action, which was dismissed with costs, to cancel an allotment of shares on the ground of fraudulent misrepresentation and suppression of material facts by the directors; to recover the amount paid upon the shares, and to be indemnified against the remaining balance—the fact that the pecuniary amount at issue was £110 only, and that the Plaintiff in issuing the writ had certified for the lower scale of costs, does not affect the discretion given to the Court by Rules of Supreme Court (Costs), August, 1875, Order VI., rule 3, to direct the costs payable by Plaintiff to be taxed on the higher and not on the lower scale. Harrison *v.* Leutner - - - - - 594

7. —— *Costs—Taxation—Perusal by Solicitor—Exhibits to Affidavits—Special Order—Rules of Supreme Court (Costs), August*, 1875, *Order VI., Schedule, "Perusals."*] Order made that the Taxing Master should be at liberty to allow a special charge for the perusal of exhibits to affidavits, the amount thereof (if any) to be in his discretion. *In re* De Rosaz. Rymer *v.* De Rosaz - - - - - - 684

8. —— *Evidence—Witness resident Abroad—Commission—Rules of Court*, 1875, *Order XXXVII. r.* 4.] L. granted to T. an exclusive license to use in England a certain patented invention for making sugar. This invention was also patented in America, and M., an American sugar manufacturer, had a license for its use in the United States. L. brought his action against T. to have the license rectified, alleging that the real agreement between the parties was that the license was not to interfere with the importation into England of sugar made abroad under the patent. The statement of claim alleged that M. had introduced L. to T., and that the negotiations between L. and T. had proceeded on the understanding that sugar made abroad under the patent might be imported; but there was no allegation, nor did it appear in evidence, that M. had taken part in the negotiations. L. applied to have a commission to examine M. in America:—*Held*, by Chitty, J., that the application must be refused as in *Berdan* v. *Greenwood* (20 Ch. D. 764, n.) for that it was essential that M., an interested witness, should be examined and cross-examined orally before the Judge who tried the case.—*Held*, by the Court of Appeal, that if it appeared that the evidence of M. would be material, the commission ought to be granted, there being nothing to shew that M. was keeping out of the way to avoid cross-examination; and that *Berdan* v. *Greenwood* turned on the fact that the Court was convinced that the plaintiff there was so keeping out of the way.—But, *held*, that on the materials before the Court the commission was rightly refused, there being nothing to shew that M. had taken such part in the negotiations as to make his evidence material. The Court, however, as an indulgence, gave the Plaintiff an opportunity of adducing evidence to shew that M. could give material evidence. Langen *v.* Tate - C.A. 522

9. —— *Interrogatories—Sufficiency of Answer—Knowledge of Servant or Agent.*] In an action by owners of water mills to restrain a canal company, who had statutory power to take water from the river on which the Plaintiffs' mills were situate, from wrongfully diminishing the quantity of water in the river to the injury of the Plaintiffs, the Defendants interrogated the Plaintiffs and asked them to give a list of the days between specified dates on which they alleged that the working of their mills was interfered with by the negligence of the Defendants. The Plaintiffs answered that they were unable to specify the particular days:—*Held*, that this answer was sufficient, and that the Plaintiffs were not bound to state whether they had made inquiries of their agents, servants, and workmen. — *Bolckow* v. *Fisher* (10 Q. B. D. 161) distinguished. Rasbotham *v.* Shropshire Union Railways and Canal Company - - - - 110

10. —— *Payment of Money out of Court—Petitioner entitled under Will—New Zealand—Probate—English Probate necessary.*] A petitioner asked for payment out of Court of money to which he was entitled under an appointment by will:—*Held*, that probate of the will in the Supreme Court of New Zealand was not sufficient for this Court to act upon, but the will must be proved in England. *Ex parte* Limehouse Board of Works. *In re* Vallance - - - 177

11. —— *Production of Documents—Place of Production—Alteration of Order.*] Where an order has been made for production of documents at a particular place the Judge, or his successor, may at any time make a fresh order appointing a different place if the circumstances render it advisable. And although such an order may be appealed from, the Court will not interfere with the Judge's discretion except on some special ground. The common order having been made for production of documents by the Defendants at their solicitor's office in London, the Judge, six months afterwards, made another order that the documents should be produced at Colchester. The documents consisted principally of ancient charters and books of account belonging to the corporation:—*Held*, by the Court of Appeal, that the order was right; but a direction was added that the Plaintiffs should be at liberty to apply for the production of any documents which might be more conveniently examined in London: and that the Defendants should undertake to pay any

PRACTICE—*continued.*

additional costs caused by the alteration in the place of production. PRESTNEY *v.* CORPORATION OF COLCHESTER - - - C. A. 376

12. —— *Stay of Proceedings pending Appeal —Refusal by Court below to stay—Time within which Application may be made to Court of Appeal —Rules of Court*, 1875, *Order* LVIII., *rr.* 16, 17.] In an action by patentees judgment was given referring it to the official referee to assess the damages occasioned to the Plaintiffs by the Defendants' infringement, and ordering payment within twenty-one days after service of the report. The Defendants appealed, and set down their appeal on the 18th of April, and then moved to stay proceedings under the judgment pending the appeal. This was refused by Chitty, J. On the 25th of June, the official referee made his report, and on the 14th of July, more than twenty-one days after the above refusal, the Defendants gave notice of motion before the Court of Appeal that the time for payment of the damages might be extended till after the hearing of the appeal. The Plaintiffs took the objection that the application could not be made as an original motion, and as an appeal motion was out of time:—*Held*, that Order LVIII., r. 16, gives concurrent jurisdiction to the Court below and to the Court of Appeal as to staying proceedings pending an appeal; that rule 17 does not take away any of the jurisdiction thus given to the Court of Appeal, but only requires that it shall not be exercised till an application has first been made to the Court below, and that the application to the Court of Appeal to stay proceedings when an order for that purpose has been refused by the Court below, is not properly an appeal motion, and need not be brought within twenty-one days from the refusal.—*Attorney-General* v. *Swansea Improvements and Tramways Company* (9 Ch. D. 46) considered. CROPPER *v.* SMITH - - - - - C. A. 305

13. —— *Staying Proceedings—Two Actions in One Matter—Cross-Actions—Action by Defendant in Foreign Country.*] B., resident in San Francisco, brought an action against C. in England alleging that C. had been B.'s agent to purchase for him goods in England, that B. had recently discovered that C. had in the accounts rendered charged more for the goods than he had paid for them, and asking for an account against C. as agent. C., by his statement of defence denied agency, alleged that he had as principal sold the goods to B., insisted on the accounts rendered as settled accounts, and alleged that a large balance was due. C. then commenced an action in San Francisco against B. to recover the amount which he so alleged to be due. B. moved to restrain this action:—*Held*, by Chitty, J., and by the Court of Appeal, that the action ought not to be restrained, for that there was no primâ facie inference that the bringing the action abroad, during the pendency of an action in England in which the matters in dispute could be determined, was vexatious, since the course of procedure in San Francisco might be such as to give advantages to C. of which he was entitled to avail himself, and that the burden lay on B. to prove that C.'s action was vexatious, which he had failed to do. HYMAN *v.* HELM - - - - - C. A. 531

PRACTICE—*continued.*

14. —— *Trial—Administration Action—Allegations of Fraud—Wilful Default—Reference to Chambers.*] In an action for ordinary administration it is competent for the Court to allow a case of wilful default, though not stated in the pleadings, to be raised at any time during the action, but allegations of fraud and wilful default ought not generally to be adjourned, but should be disposed of at the hearing. SMITH *v.* ARMITAGE 727

—— Costs - - - - - - 231
See TRADE-MARK. 1.

—— Foreclosure decree—Infant mortgagor 707
See MORTGAGE. 2.

—— Injunction—Light - - - 282
See LIGHT.

—— Injunction—Sale by mortgagee - 289
See MORTGAGE. 3.

—— Lancaster Court—Service out of jurisdiction - - - - - 280
See LANCASTER COURT.

—— Lands Clauses Act - - 253, 569
See LANDS CLAUSES ACT. 1, 2.

—— Trustee Acts - - - - 271
See TRUSTEE ACTS.

PRECATORY TRUST—Will - - - 199
See WILL. 8.

PRESCRIPTION—Easement—Support - 739
See SUPPORT.

—— Light—Window overlooking railway - 1
See RAILWAY COMPANY.

PRINCIPAL AND AGENT—*Measure of Damages —Warranty of Authority—Liability of Agent—Contract to take Shares—Winding-up—Summons by Liquidator.*] L. instructed his brokers to apply for fifty shares at £1 each in a company which he named. They by mistake applied for and obtained an allotment to L. in another company. L. repudiated the shares, but his name was placed on the register. The company had at that time a very large number of shares unallotted, and in the opinion of the Court the shares were unsaleable in the market. The company was soon afterwards wound up, and the name of L. was removed on his application from the list of contributories. The official liquidator then claimed £50 from the brokers by way of damages for their misrepresentation of authority:—*Held*, that the general rule as to measure of damages for breach of warranty of authority was applicable; that the liquidator was entitled to recover from the brokers the amount which the company had lost by losing the contract with L.; and that as L. was solvent and the shares unsaleable in the market, that loss was represented by the whole sum of £50 payable for the shares. *In re* NATIONAL COFFEE PALACE COMPANY. *Ex parte* PANMURE - - C. A. 367

—— Factor—Advances by broker—Lien - 54
See FACTOR.

—— Liability of agent - - - 339
See BANKRUPTCY. 1.

PRINCIPAL AND SURETY—*Promissory Notes for Moneys borrowed—Action against one Surety—Payment of Debt—Policies effected on Life of Principal Debtor—Assignment of Policies after Assured's Death to Surety's Father who had paid*

PRINCIPAL AND SURETY—*continued.*

the Premiums—Rights of Parties to Policy moneys.] C. being indebted to D., four of his friends joined him in signing and giving four promissory notes to secure the payment to D. of the sum of £13,000 and interest. D. effected three policies on the life of C. for, in the aggregate, £10,000.—In 1867, Lord H. of E., one of the co-sureties, having been sued by D. on the notes, paid, with the assistance of his father, the Earl of E., the £13,000 and interest by a mortgage of estates which were settled upon the Earl for life with remainder to Lord H. of E.; and the Earl having paid the premiums and kept the policies on foot, in September, 1871, shortly after the death of C. obtained an assignment from D. of the policies and received the £10,000 from the insurance office.—A. another of the four sureties died. His estate, which was stated to be insolvent, was being administered by the Court, and Lord H. of E. brought in a claim against it for contribution in respect of the sum paid to D. on the notes:—*Held*, that, under all the circumstances of the case, Lord H. of E. and his father, the Earl, must be treated as one person, and that the claim for contribution would be allowed, but only after Lord H. of E. had brought into account, as a set-off, the moneys which were received on the three policies assigned to the Earl, credit being first given for the premiums and other moneys which had been paid in reference to the transaction. *In re* Arcedeckne. Atkins *v.* Arcedeckne - - - - - 709

PROBATE — New Zealand — Payment out of Court - - - - 177
See Practice. 10.

PRODUCTION OF DOCUMENTS - - 376
See Practice. 11.

PROFIT—Trespasser—Action surviving against executors - - - - 439
See Trespass.

PROMISSORY NOTE—Joint note—Sureties—Contribution - - - - 709
See Principal and Surety.

PROPERTY RECOVERED—Solicitor's lien 545
See Solicitor. 4.

PURCHASE FOR VALUE—Debentures—Estoppel
See Company. 2. [85

PURCHASE-MONEY—Authority to receive 387
See Vendor and Purchaser. 4.

—— Lands Clauses Act - - 253, 569
See Lands Clauses Act. 1, 2.

RAILWAY COMPANY—*Easement over Railway — Adjoining Landowner — Interlocutory Injunction.*] The Plaintiff was owner of a house some of the windows of which overlooked a piece of land belonging to a railway company and used as a goods yard of a station. When the house had been built sixteen years the company put up a screen opposite the Plaintiff's windows to prevent his acquiring an easement of light and air. The Plaintiff brought an action for injunction to restrain the company from interfering with his light and air; and moved for an interlocutory injunction till the hearing:—*Held* (reversing the decision of Bacon, V.C.), that the Plaintiff had no equity to restrain the company from taking

RAILWAY COMPANY—*continued.*

measures to prevent prescriptive rights from being acquired for windows looking upon their land. The injunction was therefore refused.—*Norton* v. *London and North Western Railway Company* (9 Ch. D. 623) and *Swindon Waterworks Company* v. *Wilts and Berks Canal Navigation Company* (Law Rep. 7 H. L. 697) considered. Bonner *v.* Great Western Railway Company - - C. A. 1

REAL AND PERSONAL REPRESENTATIVES—Option of purchasing freehold - 199
See Option of Purchase.

REAL ESTATE—Assets—Right of retainer—Heir-at-law - - - - 654
See Administration. 3.

REAL SECURITY—Turnpike road bonds - 685
See Will. 10.

RECEIVER—Settled Estates Act - - 238
See Settled Estates Act.

RECITAL—Deed more than twenty years old 11
See Vendor and Purchaser. 2.

—— Notice of—Trust - - - 720
See Vendor and Purchaser. 3.

RE-CONVEYANCE—Unstamped deed—Compulsory purchase - - - 119
See Stamps.

RECTIFICATION OF REGISTER - - 149
See Company. 3.

REDEMPTION—Second mortgage—Extinguishment of first mortgage - - 618
See Mortgage. 1.

REGISTER—Rectification of - - 149
See Company. 3.

REGISTRATION—Resolution for liquidation 477
See Bankruptcy. 6.

—— Trade-mark - - - - 504
See Trade-mark. 2.

REHEARING—Lancaster Court—Jurisdiction
See Practice. 2. [488

REMUNERATION OF SOLICITOR - - 608
See Solicitor. 2.

RENTS AND PROFITS—Application of, during minority—Settled Land Act - 129
See Settled Land Act. 6.

REPUTED OWNERSHIP - - - 31
See Bankruptcy. 7.

RESCISSION OF CONTRACT—Vendor's lien 94
See Will. 11.

RESERVATION — Minerals—Settled Land Act
See Settled Land Act. 6. [129

—— Right of way—Absolute conveyance 572
See Vendor and Purchaser. 1.

RESIDUE—Conversion—Outstanding estate
See Administration. 1, 2. [643, 649, n.

RESOLUTION—Liquidation - - 477
See Bankruptcy. 6.

RESTRICTIVE COVENANTS—Building estate
See Covenant. [180

RETAINER—Right of - - - 654
See Administration. 3.

REVIVOR—Death of sole Plaintiff — Person attending proceedings - - 126
See Practice. 3.

RULES OF BUILDING SOCIETY - - 421
See Building Society.
RULES OF MUTUAL LOAN SOCIETY 425,n.
See Company. 5.
RULES OF SUPREME COURT, 1875, Order **XXXVII., r. 4** - - - 522
See Practice. 8.
—— **Order XXXVIII., r. 4** - - - 606
See Practice. 4.
—— **Order L.** - - - - - 126
See Practice. 3.
—— **Order LV., r. 1** - - - 273, 669
See Practice. 1, 5.
—— **Order LVIII., r. 15** - - - 488
See Practice. 2.
—— —— **rr. 16, 17** - - - - 305
See Practice. 12.
—— **(Costs), August, 1875, Order VI.** - 594
See Practice. 6.
—— —— —— —— **Schedule "Perusals"** 684
See Practice. 7.

SALE—Mortgagee—Injunction to restrain 289
See Mortgage. 3.
—— Settled Land Act - - - 144
See Settled Land Act. 7.
—— Settled Land Act—Remuneration of solicitor - - - - - 608
See Solicitor. 2.
SCHEME—Charity—Church Building Acts 213
See Church Building Acts.
SECOND MORTGAGEE—Right of redemption
See Mortgage. 1. [618
SECURITY—Bill of sale—Order and disposition
See Bill of Sale. [210
SEPARATE ESTATE - - - 222, 346
See Husband and Wife. 1, 2.
—— Agreement to settle after-acquired property
See Settlement. 1. [195
—— Post-nuptial settlement - - 597
See Voluntary Settlement.
—— Taxation of costs - - - 405
See Solicitor 1.
SERVANT—Knowledge of—Interrogatories 110
See Practice. 9.
SERVICE—Notice—Shareholder - - 149
See Company. 3.
—— Out of jurisdiction—Lancaster Court 280
See Lancaster Court.
—— Substituted—Notice of appeal - 364
See Bankruptcy. 2.

SETTLED ESTATES ACT, 1877 (40 & 41 *Vict. c.* 18), *ss.* 4, 13, 23, 46—*Legal Estate—No Beneficial Owner—Trustees—Persons to present Petition—Receiver.*] Where an estate is vested in trustees and there is not for the time being any beneficial owner of the rents and profits, the trustees are persons who may, under the 23rd section of the Settled Estates Act, 1877, apply to the Court by petition in a summary way to exercise the powers conferred by the Act.—*Wolley* v. *Jenkins* (23 Beav. 53) discussed. Vine *v.* Raleigh - - 238

SETTLED LAND ACT, 1882 (45 & 46 *Vict. c.* 38), *s.* 38—*Appointment of Trustees—Solicitor for the*

SETTLED LAND ACT, 1882—*continued.*

Tenant for Life.] A testator devised his real estate to the use of G. & W. in fee upon trusts in strict settlement, and bequeathed to them his residuary personal estate upon trust to invest it in the purchase of land to be conveyed to them upon the same trusts. The will contained no power of sale. W. was the family solicitor, a person of good position and high character, and after the death of the testator he acted as solicitor to the trustees and also to the tenant for life. The tenant for life being desirous of selling part of the estates under the powers of the Settled Land Act, applied to the Court to appoint G. and W. trustees for the purposes of the Act:—*Held* (affirming the decision of Kay, J.), that W. ought not to be appointed, for that although he was in all other respects a most proper person, his being solicitor to the tenant for life, made him unsuitable for an office the duties of which required him to check the proceedings of the tenant for life. *In re* Kemp's Settled Estates - - - - 485

2. —— *Appointment of Trustees—Payment of Money out of Court.*] Where a testator's daughter was beneficial tenant for life of a fund paid into Court upon the compulsory purchase of the testator's property, the daughter being one of the two trustees of the will, and both trustees being desirous of resigning their trusts; and there being no power of sale in the will.—The Court appointed two new trustees of the settlement effected by the will for the purposes of the Settled Land Act, 1882, and ordered the fund to be paid out to such trustees, to be held by them upon the trusts of the will. *In re* Wright's Trusts - - 662

3. —— *Appointment of Trustees—Payment of Money out of Court.*] A testator devised freehold property to trustees in trust for his grandson for life, and then for his issue in tail. There were four trustees of the will, and the testator's grandson was one of such trustees. The will contained no power of sale. Shortly after the testator's death a portion of the property comprised in the will was purchased by a railway company under their powers, and the money was paid into Court. —Upon petition for payment of the money out of Court, an order was made appointing three of the trustees of the will, omitting the testator's grandson (the tenant for life), to be trustees of the settlement effected by the will for the purposes of the Settled Land Act, 1882; and the fund was ordered to be paid out to such three trustees to be held by them upon the trusts of the will.—And it appearing that the trustees of the will had advanced a large sum of money on mortgage including, by anticipation, a sum of money equivalent to the fund in Court—it was ordered that the three trustees appointed by the Court be at liberty to pay the fund to the four trustees of the will upon the execution by them of a declaration of trust in favour of the three trustees of so much of the principal sum secured by the mortgage as should be equivalent to the proceeds of the fund ordered to be paid out of Court. *In re* Harrop's Trusts - - - - - - 717

4. —— (45 & 46 *Vict. c.* 38), *s.* 58, *sub-s.* 2—*Infant having Powers of Tenant for Life—Contingency of attaining Twenty-one—Executory Limitation—Appointment of Trustees.*] Certain estates

SETTLED LAND ACT, 1882—*continued.*

were devised to the use of the testator's wife and G. T., upon trust to pay the net rents and income of the estates to the wife for the maintenance, education, and benefit of the testator's son until he should attain twenty-one, and without being liable to account to the trustees or to the son for the same; and upon the son's attaining twenty-one, then upon trust for him absolutely; but if he should die under twenty-one without leaving issue, then upon trust to permit the wife to receive such rents and income for her life, and after her death upon the trusts therein mentioned:—*Held*, under the Settled Land Act, 1882, s. 58, sub-s. 2, that the infant son had the powers of a tenant for life, being tenant in fee simple with an executory limitation over in case of dying under twenty-one without issue. The trustees of the will appointed trustees for the purposes of the Act. *In re* MORGAN [114

5. —— (45 & 46 *Vict. c.* 38), *s.* 58, *sub-s.* 1 (IX.) —*Limited Owner — Power of Sale—Tenant for Life.*] Subject to a term for raising certain sums, freehold estates were devised to the use of trustees during the life of A. without impeachment of waste, with remainders to the use of A.'s children in tail. The trustees were to enter into possession, and during the life of A. manage the property and pay all expenses and outgoings, and keep down the interest on charges, and pay the balance or ultimate residue of the rents and profits to A. during his life. After paying all outgoings, only a very small annual surplus remained payable to A.:—*Held*, that A. was under the will a person "entitled to the income of land under a trust or direction for payment thereof to him during his life, subject to expenses of management," within the Settled Land Act, 1882, s. 58, sub-s. 1 (IX.), and therefore possessed the powers of selling given by the Acts to tenants for life. *In re* JONES 583

6. —— (45 & 46 *Vict. c.* 38), *ss.* 2, 3, 6, 11, 17, 25, 33, 56, 60—*Infant Tenant in Tail—Powers of Leasing—Sale and Exchange—Mining Leases—Surface Land apart from Mines—Application of Rents—Proceeds of Sale—Conflict between Settlement and Act.*] Upon a summons under the Settled Land Act to obtain the opinion and direction of the Court as to the effect of the Act upon certain clauses in a settlement where an infant tenant in tail was entitled to possession, the following questions were decided:—1. The settlement gave the trustees power during the minority of any person entitled to possession to receive and apply rents and profits in management of estate and maintenance of infant, and to accumulate and apply the surplus in paying off charges or in purchase of real estate to be settled to the same uses:—*Held*, that the rents and profits received by the trustees during the minority were to be treated in manner directed by the settlement and without regard to the Act.—2. Power in the settlement to the trustees with the consent of the tenant for life, if of age, and if not, of his guardians, to sell or exchange:—*Held*, that this power was exercisable by the trustees during the minority at the request and by the direction of the guardians of the infant tenant in tail.—3. Power in the settlement for the guardians during minority to grant leases for twenty-one years, building leases for ninety-nine

SETTLED LAND ACT, 1882—*continued.*

years, and mining leases for sixty years:—*Held*, that this power was exercisable during minority by the guardians with the consent of the trustees:—4. *Held*, that the rents derived from mining leases were to be applied by the trustees in manner directed by the settlement, as coming within the term "contrary intention" expressed in the 11th section of the Act.—5. *Held*, that there being no power in the settlement to sell surface land apart from minerals the trustees could exercise that power under sect. 17 of the Act; and this being an execution of a statutory power, the consent of the guardians would not be necessary. *In re* DUKE OF NEWCASTLE'S ESTATES - 129

7. —— (45 & 46 *Vict. c.* 38), *s.* 63—*Sale by Trustees — Absolute Trust for Sale—Consent of Beneficiaries.*] In determining whether land vested in trustees on an absolute trust for sale is subject to the provisions of sect. 63 of the Settled Land Act, 1882, the Court must look simply at the instrument which created the trust, and if at the time when a contract for sale is entered into by the trustees, there is no person who, by virtue of the provisions of that instrument, is entitled to the income of the money arising from the sale, or of the land until sale, for his life, or any other limited period, sect. 63 does not apply, but the trustees can exercise the trust for sale just as they could have done prior to the passing of the Act. *In re* EARLE AND WEBSTER'S CONTRACT - 144

—— Appointment of trustees—Pending action *See* SETTLEMENT. 4. [558

—— Sale under—Remuneration of solicitor 608 *See* SOLICITOR. 2.

SETTLEMENT — *After-acquired Property—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 5, 19—*Property to separate use excepted —Settlement not affected by Act.*] A marriage settlement made in 1862 contained an agreement for the settlement of any future acquired property of the wife to a specified amount (except interests settled and limited to her separate use). The wife after the commencement of the Married Women's Property Act, 1882, became entitled absolutely to a bequest above the specified amount, without any limitation as to separate use:—*Held*, that by the 19th section of the above Act the marriage settlement was exempted from the 5th and other sections; and that the bequest to the wife came within the covenant to settle future acquired property and must be dealt with as if the Act had never been passed. *In re* STONOR'S TRUSTS 195

2. —— *Construction — Trust for Children — Power of Appointment—Default of Appointment—Class when to be ascertained.*] By a settlement dated in May, 1833, a leasehold house was assigned to trustees upon trust for A. for life, and after her decease for B., her husband, for life, and after the decease of the survivor of A. and B. upon trust to assign the premises unto and amongst such of the children of A. and B. then living in such manner, shares, times, and proportions as A. and B. jointly, or the survivor of them separately, should by any writing appoint, and in case there should be no such child or children, then upon trust for C. for life, and after his decease upon trust to assign the premises unto and amongst

SETTLEMENT—*continued.*

such of his children, and in such manner, shares, times, and proportions, as he should by any writing appoint.—A. died in 1876 without leaving issue. B. died in 1880. C. died in 1863 without having exercised the power of appointment, having had ten children, of whom three died before him, two after and before the death of A., and one after the death of A. and before that of B.:—*Held*, that all the children of C. took as tenants in common in equal shares. WILSON *v.* DUGUID - 244

3. —— *Power of appointing New Trustees—Trustee remaining Abroad for more than Twelve Months—Person to exercise Power—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 31—*Settlement executed before Act.*] A settlement executed in 1878 contained no express power to appoint new trustees, but there was a declaration that the husband and wife during their joint lives, and the survivor of them during his or her life, "shall have power to appoint new trustees or a new trustee for this settlement." There was no express reference to the power of appointing new trustees conferred by sect. 27 of Lord Cranworth's Act, which was then in force:—*Held*, that after the commencement of the Conveyancing Act, 1881, the husband and wife were the proper persons to exercise the power conferred by sect. 31 of that Act of appointing a new trustee in place of one of the trustees who had remained out of the United Kingdom for more than twelve months, though sect. 27 of Lord Cranworth's Act did not provide for, and the parties when they executed the settlement probably did not contemplate, the occurrence of a vacancy in that event. *In re* WALKER AND HUGHES' CONTRACT - 698

4. —— *Power of Sale—Tenant for Life—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 3, 53—*Appointment of New Trustee—Pending Action.*] Independently of the cumulative powers of sale given to tenants for life by the Settled Land Act, 1882, the tenant for life, and the trustees under a will which gives them power to sell the estate at the request and by the direction of the person or persons for the time being entitled to the actual freehold of the devised property, will not be restrained from selling the estate at the request and for the benefit of the tenant for life on merely speculative evidence adduced by the remainderman objecting to an immediate sale, of an expected future increase in the value of the property from the development of coal mines, and the construction of a railway through the estate. THOMAS *v.* WILLIAMS - - - - - 558

—— Post-nuptial - - - - 597
See VOLUNTARY SETTLEMENT.

SHARES—Contract to take—Agent's authority
See PRINCIPAL AND AGENT. [367

SHAREHOLDER—Service of notice on - 149
See COMPANY. 3.

SOLICITOR—*Bill of Costs—Married Woman—Costs—Receiver—Taxation of Solicitor's Bill—Solicitors' Act* (6 & 7 *Vict. c.* 73), *s.* 43—*Judicature Act*, 1873, *s.* 25, *sub-s.* 8.] M., a married woman, by her next friend, applied to tax the bill of costs of her solicitor incurred in a suit relating to her separate estate. After the Taxing Master's certificate had been filed, an order was made on the application of the solicitor directing an inquiry of what M.'s separate estate consisted at the date of the filing of the certificate capable of being reached by the judgment and execution of the Court, and appointing a person to receive it until the amount found due on taxation was paid:—*Held*, that this order was proper, and that it was not necessary to take separate proceedings by action to enforce the demand against the separate estate. *In re* PEACE & WALLER - - - - C. A. 405

SOLICITOR—*continued.*

2. —— *Bill of Costs—Settled Land Act*, 1882—*Sale by Tenant for Life—Solicitors' Remuneration Act*, 1881—*General Order—Solicitor's Remuneration in respect of Business connected with Sales—Auctioneer's Charges.*] Settled property which had been put up for sale by auction by the tenant for life under the Settled Land Act, 1882, but withdrawn for want of any sufficient offer, having been sold by private contract on the same day:—*Held*, on summons by the trustees for the decision of the Court, that one charge, according to the scale set out in Part I. of Schedule 1 of the General Order under the Solicitors' Remuneration Act, 1881, was payable out of the purchase-money to the tenant for life's solicitor for conducting the sale, including the conditions of sale, and one charge for deducing the title and completing the conveyance, including the preparation of the contract; and that the costs of the concurrence in the sale by the mortgagees of the tenant for life, and a proper sum for the auctioneer's charges, were also payable out of the purchase-money. *In re* BECK. *In re* CARTINGTON ESTATE - - 608

3. —— *Lien on Documents — Winding-up.*] An order having been made for winding up a company, applications were made by the official liquidator against B., a solicitor employed by the company before the winding-up that B. might be ordered to deliver up the following documents: 1. The share register and minute book, which were in B.'s hands before the commencement of the winding-up; 2. Other documents which came to B.'s hands after the presentation of the winding-up petition, but before the winding-up order; 3. Documents relating to allotments of shares which had come to B.'s hands before the presentation of the petition. B. resisted the applications on the ground that he claimed a lien. Mr. Justice Chitty ordered that all the documents should be delivered to the liquidator subject to the lien, if any, of B.:—*Held*, on appeal, that the order was right as regarded the share register and minute book, for that the directors had no power to create any lien on them which could interfere with their being used for the purposes of the company:—*Held*, also, that the order was right as to class 2; for that a solicitor could not assert against documents which came to his hands pending the winding-up any such lien as would interfere with the prosecution of the winding-up.—But *held*, that the order for delivery of class 3 must be discharged, for that the winding-up order could not defeat any valid lien existing at the time when the winding-up petition was presented.—*Belaney* v. *Ffrench* (Law Rep. 8 Ch. 918) and *Boughton* v. *Boughton* (23 Ch. D. 169) distinguished. *In re* CAPITAL FIRE INSURANCE ASSOCIATION C. A. 408

SOLICITOR—*continued.*

4. —— *Lien*—23 & 24 *Vict. c.* 127, *s.* 28—*Property recovered or preserved*—*Property of Person not employing the Solicitor*—*Property of Infant.*] The charge declared in pursuance of the 28th section of the Solicitors' Act, 1860, on the property recovered or preserved in favour of the solicitor employed is in the nature of salvage, and may be made on the interest of persons who did not employ the solicitor and who were not parties to the suit, if they adopt the benefit obtained in the suit.—It makes no difference that the persons whose interests are charged are infants, but the Court will not make the order until the infants have an opportunity of being heard on it.—P. and Y. were trustees under the will of G. P. misapplied some of the trust funds and died. The suit of *M.* v. *P.* was brought for the administration of P.'s estate, and a proof was carried in by Y. on behalf of the trust in respect of the breaches of trust by P. Afterwards the action of *G.* v. *Y.* was brought by some of the cestuis que trust under G.'s will to establish the liability of Y. and to appoint new trustees, in which a small dividend was recovered from Y.'s estate. The solicitor who acted for the Plaintiffs in *G.* v. *Y.* applied for a charging order for his costs on the dividend recovered from P.'s and Y.'s estates, which was opposed by the new trustees on behalf of the infant cestuis que trust:—*Held*, that the solicitor was entitled to a charge upon the dividend recovered in the action from Y.'s estate as against the infant cestui que trust, but not on the dividend recovered from P.'s estate, as it was not recovered in the action. Greer *v.* Young [C. A. 545

—— Appointment as trustee - - 485
See Settled Land Act. 1.

—— Authority to receive purchase-money—Conveyancing Act, 1881 - - 387
See Vendor and Purchaser. 4.

—— Mortgage from client—Sale—Injunction
See Mortgage. 3. [289

—— Partnership—Liability - - 731
See Partnership.

SPECIAL ACT—Compulsory purchase—Costs 669
See Practice. 5.

SPECIAL GROUNDS—Extension of time for appeal - - - - 488
See Practice. 2.

SPECIFIC PERFORMANCE—Covenant—Building estate - - - - 180
See Covenant.

STAMPS—*Vendor and Purchaser*—*Title*—*Unstamped Deed*—*Compulsory Purchase*—*Payment into Court*—*Costs of Petition*—*Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 75, 80, 82.] A freehold land society in 1871 purchased some land in Epping Forest, which was conveyed to them in fee. They conveyed it in allotments to various members of the society who respectively paid for their allotments. Afterwards the Epping Forest Act, 1878, was passed, and it provided that the land (together with other lands) should be thrown open to the public, certain compensation, the amount of which was to be ascertained by an arbitrator, being paid by the Conservators

STAMPS—*continued.*

appointed by the Act to the owner of the soil of any land thrown open. With the Act were incorporated the provisions of the Lands Clauses Act, 1845, with respect to the purchase-money or compensation coming to parties having limited interests, or prevented from treating, or not making title, and with respect to the conveyances of lands. After the passing of the Act the land society repurchased the allotments from the allottees, repaying them their purchase-moneys. The allottees reconveyed the plots to the trustees of the society, the reconveyances being indorsed on the original conveyances, but the reconveyances were not stamped within the proper time after execution. The arbitrator determined the amount of compensation to be paid by the Conservators to the society, and the society furnished an abstract of title to the Conservators. The Conservators made no objection to the title, except that the reconveyances ought to be stamped, and they required the society to have them stamped at their own expense. The society declined to do this, but offered that the allottees should join with the trustees of the society in a conveyance to the Conservators. The Conservators would not accept this offer, but paid the compensation money into Court, and, under sect. 75 of the Lands Clauses Act, executed a deed-poll vesting the land in themselves in fee. The society petitioned for payment of the money to them:—*Held*, that it was not necessary that the reconveyances should be stamped; that the Conservators ought to have been satisfied with the conveyance offered them by the society; and that the Conservators must pay the costs of the petition.—*Whiting to Loomes* (14 Ch. D. 822; 17 Ch. D. 10) distinguished. *Ex parte* Birkbeck Freehold Land Society 119

STATUTES:

27 Eliz. c. 4, s. 1—*Fraudulent Conveyances* 597
See Voluntary Settlement.

12 Car. 2, c. 24—*Guardians* - - 317
See Infant.

52 Geo. 3, c. 101—*Sir S. Romilly's Act* - 213
See Church Building Acts.

3 & 4 Will. 4, c. 104—*Administration* - 654
See Administration. 3.

5 & 6 Will. 4, c. 76—*Municipal Corporations*
See Charity Commissioners. 1. [587

5 & 6 Vict c. 39—*Factors* - - 54
See Factor.

6 & 7 Vict. c. 73, s. 43—*Solicitors* - 405
See Solicitor. 1.

8 & 9 Vict. c. 16—*Companies Clauses* - 85
See Company. 2.

8 & 9 Vict. c. 18, ss. 75, 80, 82—*Lands Clauses*
See Stamps. [119

—— —— s. 76 - - - - 253
See Lands Clauses Act. 1.

—— —— s. 80 - - - - 569
See Lands Clauses Act. 2.

8 & 9 Vict. c. 70, s. 22—*Church Building* 213
See Church Building Acts.

12 & 13 Vict. c. 26—*Leases* - - 624
See Lease.

STATUTES—*continued.*
15 & 16 Vict. c. 55, s. 9—*Trustees* - 271
See TRUSTEE ACTS.
16 & 17 Vict. c. 137, s. 62—*Charitable Trusts* [587, 591
See CHARITY COMMISSIONERS. 1, 2.
17 & 18 Vict. c. 82, s. 8—*Lancaster Court* 280
See LANCASTER COURT.
18 & 19 Vict. c. 124, ss. 29, 48—*Charitable Trusts* - - - - 587, 591
See CHARITY COMMISSIONERS. 1, 2.
23 & 24 Vict. c. 127, s. 28—*Solicitors* - 545
See SOLICITOR. 4.
23 & 24 Vict. c. 145, s. 27—*Trustees* - 698
See SETTLEMENT. 2.
25 & 26 Vict. c. 89, s. 35; Table A., arts. 59, 97—*Companies* - - - 149
See COMPANY. 3.
—— —— s. 91 - - - - 259
See COMPANY. 4.
32 & 33 Vict. c. 46—*Hinde Palmer's Act* 654
See ADMINISTRATION. 3.
32 & 33 Vict. c. 71, s. 6, sub-s. 2—*Bankruptcy* [339
See BANKRUPTCY. 1.
—— —— ss. 6, 125, sub-s. 7 - - 353
See BANKRUPTCY. 4.
—— —— ss. 12, 15, 47, 48, 49, 54 - 672
See BANKRUPTCY. 8.
—— —— s. 15, sub-s. 5 - - - 31
See BANKRUPTCY. 7.
—— —— s. 23 - - - - 26
See BANKRUPTCY. 3.
—— —— s. 125 - - - - 477
See BANKRUPTCY. 6.
—— —— s. 125, sub-s. 12 - - 35
See BANKRUPTCY. 5.
36 & 37 Vict. c. 66, s. 25, sub-s. 8—*Judicature* [405
See SOLICITOR. 1.
37 & 38 Vict. c. 78—*Vendor and Purchaser* 190
See WILL. 7.
—— —— s. 2 - - - - 11
See VENDOR AND PURCHASER. 2.
38 & 39 Vict. c. 91, s. 10—*Trade-marks* 504
See TRADE-MARK. 2.
40 & 41 Vict. c. 18, ss. 4, 13, 23, 46—*Settled Estates* - - - - 238
See SETTLED ESTATES ACT.
40 & 41 Vict. c. 34—*Locke King's Amendment Act* - - - - - 94
See WILL. 11.
41 & 42 Vict. c. 31—*Bills of Sale* - 210
See BILL OF SALE.
44 & 45 Vict. c. 41, s. 31—*Conveyancing and Law of Property* - - - 698
See SETTLEMENT. 3.
—— —— s. 56 - - - - 387
See VENDOR AND PURCHASER. 4.
45 & 46 Vict. c. 38—*Settled Land Act* 662, 717
See SETTLED LAND ACT. 2, 3.
—— —— - - - - - 608
See SOLICITOR. 2.
—— —— ss. 2, 3, 6, 11, 17, 25, 33, 56, 60 129
See SETTLED LAND ACT. 6.

STATUTES—*continued.*
45 & 46 Vict. c. 38, ss. 3, 53 - - 558
See SETTLEMENT. 4.
—— —— s. 38 - - - - 485
See SETTLED LAND ACT. 1.
—— —— s. 58, sub-s. 1 - - - 583
See SETTLED LAND ACT. 5.
—— —— —— sub-s. 2 - - - 114
See SETTLED LAND ACT. 4.
—— —— s. 63 - - - - 144
See SETTLED LAND ACT. 7.
45 & 46 Vict. c. 43—*Bills of Sale* - 210
See BILL OF SALE.
45 & 46 Vict. c. 75—*Married Women's Property* - - - - - 222
See HUSBAND AND WIFE. 2.
—— —— ss. 5, 19 - - - - 195
See SETTLEMENT. 1.

STAYING PROCEEDINGS - - - 531
See PRACTICE. 13.
—— Appeal from order - - - 305
See PRACTICE. 12.

SUBSTITUTED SERVICE—Notice of appeal 364
See BANKRUPTCY. 2.

SUFFICIENCY—Answer to interrogatories 110
See PRACTICE. 9.

SUPPORT—*Easement—Prescription—Presumption—Enjoyment as of Right.*] In 1856 A. built on a wall belonging to B., the rest of the building being on land laid out by B. for a street. By a deed made in 1864, A. covenanted with B. that A. would on three months' notice macadamise the street and keep it in repair. This deed was recited in another deed made between A. and B. in 1877, in which the proposed street was referred to. The street was never made, and the design had been abandoned:—*Held*, that A.'s enjoyment of support from the wall was not as of right, and that no easement was acquired.—*Dalton* v. *Angus* (6 App. Cas. 740) discussed. TONE *v.* PRESTON [739

SURETY—Contribution - - - 709
See PRINCIPAL AND SURETY.

SURVIVAL—Action for trespass - - 439
See TRESPASS.

TAXATION OF COSTS—Higher or lower scale [594
See PRACTICE. 6.
—— Perusal of exhibits - - - 684
See PRACTICE. 7.
—— Separate estate - - - - 405
See SOLICITOR. 1.

TENANT FOR LIFE—Power of sale—Settlement—Injunction - - - 558
See SETTLEMENT. 4.
—— Settled Land Act—Infant - - 114
See SETTLED LAND ACT. 4.
—— Settled Land Act—Limited owner - 583
See SETTLED LAND ACT. 5.

TENANT IN TAIL—Heirlooms—Vesting - 102
See WILL. 6.
—— Infant—Powers under Settled Land Act 192
See SETTLED LAND ACT. 6.

TIME—Appeal—Application to stay proceedings
See Practice. 12. [305
—— Appointment of trustee in liquidation 353
See Bankruptcy. 4.
—— Extension of—Appeal - - - - 488
See Practice. 2.
TITLE—Limited—Conditions of sale - 11
See Vendor and Purchaser. 2.
—— Objections to - - - - 720
See Vendor and Purchaser. 3.

TRADE-MARK—*Innocent Consignee—Infringement—User—Costs.*] The Defendant, who was a china manufacturer, purchased abroad for his own private use a large number of cigars which were consigned to him at the docks here in cases bearing a spurious brand, purporting to be that of the Plaintiffs, who were cigar manufacturers. The Defendant was not aware that the braud was spurious, nor, except from seeing it on the invoice, that any such brand was in use. Immediately upon the Plaintiffs issuing their writ and serving the Defendant with notice of motion for an injunction to restrain him from selling the cigars, the Defendant stated that he had no intention of selling the cigars, and offered all the relief asked for by the writ, and afterwards at the motion agreed to an undertaking in the terms of the writ, the question of costs being reserved:—*Held*, that the Defendant must pay all the costs of the action. Upmann *v.* Forrester - - 231

2. —— *Registration—Cancelling of Registration—Special and distinctive Words used as a Trade-mark before the Trade-marks Act—Words descriptive of Patented Article — Trade-marks Registration Act*, 1875 (38 & 39 *Vict. c.* 91), *s.* 10.] P. in 1876 registered "braided fixed stars" as a trade-mark for matches, alleging that he had used it as a trade-mark before the passing of the Act. He also at the same time registered a label enveloping the boxes in which his matches were sold, which contained the words "braided fixed stars" in two places so as to be conspicuous on each side of the boxes, but also contained a number of other words. It was shewn that at the time when P. introduced the term "braided fixed stars" the term "fixed stars" was known in the trade as denoting a particular class of fusees, and that he had just bought a patent for enveloping the stems of fusees with wire by means of a braiding machine. This patent expired in August, 1881. It appeared from the evidence that P. had not before the Act used "braided fixed stars" separately as a trade-mark, or otherwise than as a part of the above-mentioned label. In October, 1881, an application was made by a rival trader to expunge the registration:—*Held*, that the registration must be expunged, for that to entitle P. to register these words as a trade-mark he must before the Act have used them as such alone, and not merely in conjunction with other words.—*Held*, further, that if they had been so used alone they ought not to have been registered, for that they were only words properly descriptive of the patented article, and that P. had no exclusive right to their use after the patent had expired. *In re* J. B. Palmer's Trade-mark - C. A. 504

TRANSFER—Debentures - - - 85
See Company. 2.

TRESPASS—*Actio personalis moritur cum personâ—Benefit received by Trespasser.*] By the decree in 1870 it was declared that H. & F. and the estate of their deceased partner were liable to the Plaintiffs for minerals taken by them under the Plaintiffs' farm, and that H. & F. were liable to compensate the Plaintiffs for user of all roads and passages under the farm, and inquiries were directed—1. As to the quantity of minerals taken and the value. 2. What quantities of minerals had been carried by the Defendants through the roads or passages under the farm. 3. What upon the result of the second inquiry ought to be paid by the Defendants as wayleave for the user of the roads and passages. 4. Whether the farm, and the mineral property of the Plaintiffs under it, had sustained any and what damage by reason of the way in which the Defendants had worked under the farm. Pending these inquiries F. died, and his executrix moved to stay proceedings under the second, third, and fourth inquiries:—*Held*, by Pearson, J., that the fourth inquiry must be stayed, but that as the estate of F. had derived profit from the trespasses to which the second and third inquiries related, it was liable after his death and that those inquiries must be prosecuted:—*Held*, on appeal by Cotton and Bowen, L.JJ., dissentiente Baggallay, L.J., that proceedings under the second and third inquiries must also be stayed, for that, apart from cases of breach of contract, a remedy for a wrongful act done by a deceased person cannot be pursued against his estate, unless property or the proceeds or value of property belonging to another person have been appropriated by the deceased person and added to his estate. Philips *v.* Homfray - C. A. 439

TRIAL—Administration action—Wilful default—Charge of fraud - - - 727
See Practice. 14.
TRUST—For sale—Settled Land Act - 144
See Settled Land Act. 7.
—— Notice of - - - - 720
See Vendor and Purchaser. 3.
TRUSTEE—Appointment of—Conveyancing Act
See Settlement. 3. [698
—— Appointment of—Settled Land Act.
See Cases under Settled Land Act. 1–4.
—— Settled Estates Act—Petition - 238
See Settled Estates Act.
TRUSTEE IN LIQUIDATION—Appointment—Time - - - - 353
See Bankruptcy. 4.

TRUSTEE ACTS—*Deceased Lunatic—Appointment of New Trustee after his Death—Trustee Extension Act*, 1852 (15 & 16 *Vict. c.* 55), *s.* 9—*Affidavit—Description of Deponent as a "Gentleman."*] The Court sitting in lunacy, has power under the 9th section of the Trustee Extension Act, 1852, to appoint new trustees of the will of a deceased lunatic, where the trustees appointed by the lunatic have died in his lifetime, for the purpose of getting rid of the funds standing in Court to the credit of the lunacy.—It is not sufficient to describe a person making an affidavit of the fitness of a new trustee merely as a "gentleman." *In re* Orde - - - C. A. 271

TURNPIKE ROAD BONDS—Real security 685
See Will. 10.

ULTRÀ VIRES ACT—Application of funds of company - - - - 611
See Company. 1.

UNDISCHARGED BANKRUPT - - 672
See Bankruptcy. 8.

UNITY OF PERSON—Gift to husband and wife
See Husband and Wife. 2. [222

UNMARRIED—Meaning of - - 703
See Will. 9.

UNPAID PURCHASE-MONEY—Devise of estate —Locke King's Act - - 94
See Will. 11.

UNSTAMPED DEED—Re-conveyance—Compulsory purchase - - - 119
See Stamps.

USER—Trade-mark - - - - 231
See Trade-mark. 1.

VALIDITY—Patent - - - - 156
See Patent.

VENDOR AND PURCHASER—*Agreement for Sale —Reservation—Absolute Conveyance.*] In June, 1870, an agreement was entered into by a railway company for the purchase, at a price named, of land for the purpose of carrying a road over the line at an incline, and the agreement contained a proviso that the vendor, &c., should have a right of access to other lands belonging to him by and over any of the slopes which the company might arrange on their intended works, and through, over and upon any occupation roads which they might form adjacent to the said lands. This agreement was executed by the secretary of the company, but was not under seal.—Possession was taken by the company, and a bridge was constructed over the line which was reached by a road carried over the land purchased at a steep incline. In April, 1871, the land, with all ways, rights of pre-emption, and other rights, members, easements and appurtenances, was, in consideration of the price named in the agreement, which was stated to include the value of the mines and also all right of pre-emption and compensation for damage sustained by vendor in the execution of the works, conveyed to the company, without reserving any right of access to the vendor or in any way referring to the proviso contained in the agreement of June, 1870:—*Held*, in an action by the vendor to restrain the company from obstructing, by fences and retaining walls rendered necessary by a widening of the road, the right of access stipulated for by the proviso in the preliminary agreement, but not claiming a rectification of the subsequent conveyance, that as the vendor by the terms of the conveyance had absolutely conveyed to the company every interest which he possessed in the land, any right of access previously stipulated for was thereby absolutely extinguished. Teebay *v.* Manchester, Sheffield, and Lincolnshire Railway Company - - - - 572

2. —— *Misleading Condition of Sale—Limited Title — Voluntary Deed — Evidence — Recital in Deed more than Twenty Years old—Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78), *s.* 2.] A contract entered into in 1882 for the sale of freehold estate provided that the title should commence "with an indenture dated the 18th of October, 1845," and made between persons whose names were mentioned, and that the earlier title should not be investigated or objected to. From the abstract of title delivered by the vendors to the purchaser it appeared that the deed of 1845 was a conveyance by a person, who purported to be the absolute owner, of freehold and leasehold property to trustees, on trust for himself for life, and after his death on trust to sell the property, and to hold the proceeds of sale on the trusts declared by a deed of even date. An express power was reserved to the grantor to revoke the trusts. The deed was a voluntary one, except for the consideration which resulted from the liability assumed by the trustees in respect of the leaseholds:—*Held*, by Fry, J., and by the Court of Appeal, that, inasmuch as the fact that the deed of 1845 was a voluntary one, would influence the purchaser in determining whether he would agree to accept a title commencing within forty years, the vendors ought to have stated in the condition of sale the nature of the deed; that the omission to state this rendered the condition a misleading one; and that the purchaser was not bound by the contract to accept a title commencing with that deed.—By a deed executed in 1858 (after the death of the settlor) the trustees conveyed the property to a purchaser for value. This deed contained a recital of the deed of 1845, and a recital that the trustees "in pursuance of the trust for sale conferred on them" by that deed had caused the property to be put up for sale:—*Held*, by Fry, J., that by virtue of sect. 2 of the Vendor and Purchaser Act, 1874, this recital, not being shewn to be inaccurate, was conclusive evidence that the deed of 1845 had not been revoked either by an exercise by the settlor of the power of revocation, or by a sale of the property by him for value during his lifetime. *In re* Marsh and Earl Granville - - - - C. A. 11

3. —— *Objections to Title—Notice of Trust —Recitals in Deed.*] In 1840 property was mortgaged to W. in fee, there being nothing in the mortgage deed to shew that he was not the beneficial owner of the mortgage money. He died in 1842, having by his will devised and bequeathed his real and personal estate to three trustees (of whom his wife was one), on trusts for the benefit of his wife and children, and having appointed the same three persons executors. He also devised and bequeathed his trust and mortgage estates to the same three persons, subject to the trusts and equities affecting the same respectively. The widow alone proved the will, and alone acted as trustee. The other two trustees disclaimed the trusts. In 1854 the widow obtained a decree absolute foreclosing the mortgage. In 1865 she, by a deed indorsed on the mortgage deed, conveyed the property, without receiving any pecuniary consideration for it, to K., C., and B., in fee, as joint tenants at law and in equity. The conveyance contained a recital that the testator held the mortgage money on an account

VENDOR AND PURCHASER—*continued.*
under which K., C., and B. were then solely entitled thereto, as was thereby acknowledged, whereby the widow, as trustee under the testator's will, was trustee only of the property for K., C., and B., and they had requested her to convey it to them. On a subsequent sale of the property by persons who had purchased it from K., C., and B., the purchasers required evidence of the truth of the recital in the deed of 1865 that K., C., and B. were entitled to the mortgage money. And, assuming that the testator was a trustee of the mortgage money, the purchasers required the vendors to shew that the property sold was comprised in the trust; that K., C., and B. were duly appointed to succeed the testator in the trust; and that they had an effectual power of sale and of giving a receipt for the purchase-money:—*Held*, that it would be contrary to the practice of the Court to go behind a recital evidently framed for the purpose of keeping notice of trusts off the conveyance; that the requisitions need not be answered; and that a good title had been shewn by the vendors. *In re* Harman and Uxbridge and Rickmansworth Railway Company 720

4. —— *Payment of Purchase-money—Sale by Trustees—Authority to Solicitor to receive Purchase-money—Breach of Trust—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 56.] The 56th section of the Conveyancing Act, 1881, does not authorize vendors who are trustees with a power of sale to require the purchaser to pay the purchase-money to their solicitor on production of the deed of conveyance duly executed in cases where before the Act they could not have required the purchaser to pay the purchase-money to their solicitor under a special authority.—Trustees of real estate with a power to sell and give receipts, sold the estate. The purchasers required that the vendors should attend in person to receive the purchase-money, or should authorize the purchasers to pay it into a bank to the joint account of the vendors. The vendors insisted that the money should be paid to their solicitor on his producing the conveyance duly executed. They gave no special reason why the money should be paid to the solicitor, but relied on the 56th section of the Conveyancing Act, 1881. A summons having been taken out under the Vendor and Purchaser Act:—*Held* (dissentiente Baggallay, L.J.), that the 56th section had no application, and that the purchasers had a right to insist on their requisition.—The decision of Kay, J., reversed. *In re* Bellamy and Metropolitan Board of Works - - C. A. 387

—— Purchase by City ward—Consent of Charity Commissioners - 587, 591
See Charity Commissioners. 1, 2.

—— Title—Legal estate in executors - 190
See Will. 7

—— Title—Unstamped deed - - 119
See Stamps.

VENDOR'S LIEN—Devise of estate—Locke King's Act - - - - 94
See Will. 11.

VESTING—Heirlooms - - - 102
See Will. 6.

VOLUNTARY DEED—Title - - - 11
See Vendor and Purchaser. 2.

VOLUNTARY SETTLEMENT—*Post-nuptial Settlement—Conveyance by Husband and Wife of Wife's Separate Freeholds, and Demise by Husband of Wife's Separate Leaseholds—Subsequent Mortgage by Husband and Wife—Settlement held voluntary and void as against Mortgagee—27 Eliz. c.* 4, *s.* 1.] A married woman, having become entitled under a will to freehold and leasehold property for her sole and separate use, joined her husband in making a settlement, whereby the husband and wife conveyed the freeholds, and the husband alone demised the leaseholds, subject to the annual payment of a shilling, if demanded, to trustees, upon trust for the wife for her separate use for life, remainder to the husband for life, remainder for the children (if any), with ultimate remainder to the wife absolutely. Two years afterwards the husband and wife (there being no children of the marriage) made a mortgage of the property:—*Held*, that the conveyance by the husband, though binding on the estate by the curtesy which he would have had in his wife's freeholds if there had been issue, in the absence of any conveyance by her was not sufficient to raise a consideration moving from the husband; and that the settlement was voluntary and void under the statute as against the mortgagee. Shurmur *v.* Sedgwick. Crossfield *v.* Shurmur - 597

WARD OF COURT—Access to mother—Years of discretion - - - - 317
See Infant.

WAY—Reservation of, in agreement, not in conveyance - - - - 572
See Vendor and Purchaser. 1.

WILFUL DEFAULT—Administration action 727
See Practice. 14.

WILL—*Construction—Absolute Gift—Interest.*] Under a gift by A. to his wife of £10,000 "afterwards to go to the understated residuary legatee E.":—*Held*, that the legacy of £10,000 was given to the wife absolutely, but that interest upon such legacy did not begin to run until after one year from the testator's death. *In re* Percy. Percy *v.* Percy - - - - - 616

2. —— *Construction—"According to the Stocks."*] A testator gave the income of a trust fund to his wife for her life, and subject thereto the fund was to be held in trust for such of his cousins (the children of four deceased aunts and two deceased uncles of the testator named in the will) living at the determination of the wife's life interest, and such issue then living (if any) of his said cousins then dead as, either before or after the determination of such life interest, should attain twenty-one, or should die under twenty-one leaving issue living at his, her, or their death, to take (if more than one) in a course of distribution according to the stocks, and not according to the number of individuals. At the time of the death of the tenant for life there were living one cousin of the testator (a child of one of the uncles named in the will), and children and other issue of fifteen deceased cousins (children of the other uncle and of the four aunts named in the will):—*Held*, that the words "according to the stocks" applied

WILL—*continued.*

to the descendants of cousins, and not to the cousins themselves, and that the fund was divisible into sixteen shares.—*Robinson* v. *Shepherd* (4 D. J. & S. 129) preferred to *Gibson* v. *Fisher* (Law Rep. 5 Eq. 51). *In re* Wilson. Parker *v.* Winder - - - - - - 664

3. —— *Construction*—"*Children*"—*Illegitimate Child—Gift to Children of deceased Person.*] A testatrix bequeathed to A., "the eldest daughter of my deceased daughter S., my gold watch." And she bequeathed other property to trustees "in trust for such of the children of my said deceased daughter S. who shall attain twenty-one, absolutely, equally share and share alike, the shares of such of them as shall be daughters to be for their sole and separate use." S. had two legitimate children, a son and a daughter, and she had also an illegitimate daughter, who was the person spoken of in the will as "A., the eldest daughter of S.":—*Held*, that there was a sufficient indication of an intention that A. should be included in the description of "the children of S." *In re* Humpheries. Smith *v.* Millidge - - 691

4. —— *Construction—Contingent Remainder or Executory Devise—Gift for Life—Gift to Children living at the time of the Decease of Tenant for Life or thereafter to be born.*] Testator gave an estate to his wife Elizabeth and her assigns for her life, and after her decease unto all and every the lawful children of his son William living at the time of the decease of his wife Elizabeth or thereafter to be born, in equal shares as tenants in common:—*Held*, that this was an executory devise, and that the children born after the death of the tenant for life were entitled to share equally with those born before her death.—*Brackenbury* v. *Gibbons* (2 Ch. D. 417) and *In re Lechmere and Lloyd* (18 Ch. D. 524) observed upon. Miles *v.* Jarvis - - - - - - 633

5. —— *Construction*—"*Great Nephews, the Sons of his deceased Nephew T. G. A.*"—*Legitimacy—Domicil.*] A bequest of personalty in an English will to the children of a foreigner must be construed to mean to his legitimate children, and by international law as recognised in this country those children are legitimate whose legitimacy is established by the law of their father's domicil. Accordingly where a testator bequeathed personalty to his "great nephews the sons of his deceased nephew T. G. A." and T. G. A. was domiciled in Guernsey:—*Held*, that a son of T. G. A. born before wedlock, but legitimated according to the law of Guernsey by the subsequent marriage of T. G. A. with that son's mother, was entitled to share with the sons of T. G. A. born after the marriage in the testator's bequest.—Observations on *In re Goodman's Trust* (17 Ch. D. 266) and *Boyes* v. *Bedale* (1 H. & M. 798.) *In re* Andros. Andros *v.* Andros. [637

6. —— *Construction—Heirlooms—Contingent future Interest—Transmissibility—Tenant in Tail—Personal Estate—Vesting.*] A testator by his will directed that his books and plate should be considered as heirlooms and should pass with his real estate in the same manner as if they were an estate of inheritance at Common Law, and should so continue annexed to his said real estate as long as the law would permit, to be inherited by the several persons who should succeed thereto; and he devised and bequeathed all his real and residuary personal estate to trustees upon trust for R. C. for life, and after the decease of R. C. for his first and other sons successively in tail male, and in default of such issue upon trust for Henry C., the eldest son of J. C., for life, and after his decease for his first and other sons successively in tail male, and in default of such issue upon trust for "the next eldest son of the said J. C. who shall survive the said Henry C." for life, and after his decease upon trust for "the first and other sons of the body of the said next eldest son of the said J. C. who shall survive the said Henry C." successively in tail male, and in default of such issue upon trust for his, the testator's, own right heirs. R. C. and Henry C. died without having married. J. C. died in testator's lifetime. George was the next eldest son of J. C., who survived Henry. F. J. C. was the eldest son of George, and the first tenant in tail under the settlement, and he died an infant in the lifetime of R. C. and of Henry C.:—*Held*, that notwithstanding the death of F. J. C. before it could be known whether his father would survive Henry C., or whether there would be any issue male either of R. C. or Henry C., the heirlooms and residuary personalty vested absolutely in the legal personal representative of F. J. C.—*Hogg* v. *Jones* (32 Beav. 45) distinguished. *In re* Cresswell. Parkin *v.* Cresswell - 102

7. —— *Construction—Legal Estate in Executors—Vendor and Purchaser Act*, 1874—*Interest commensurate with Objects of Will.*] A testator, after directing his debts to be paid, and setting apart certain sums to provide annuities for his two sons, devised and bequeathed all his real and personal estate to his wife and his four daughters, to be equally divided between them: Provided as follows—that the share of his wife should be divided after her death between his four daughters or the survivors and their children; and the testator appointed his wife and T. Davies, his executors, to act jointly in carrying out all the intentions of his will, and to invest his daughter's shares for their benefit and the benefit of their children.—*Held*, upon an application under the Vendor and Purchaser Act, that the legal estate in the freeholds was vested in the executors who could make a good title to a purchaser. Davies to Jones and Evans - - - 190

8. —— *Construction—Precatory Trust.*] A testator gave and devised all his real and personal estate unto and to the absolute use of his wife, her heirs, executors, administrators, and assigns, "in full confidence that she will do what is right as to the disposal thereof, between my children, either in her lifetime or by will after her decease." *Held*, that under these words the widow took an absolute interest in the property unfettered by any trust in favour of the children.—*Lambe* v. *Eames* (Law Rep. 6 Ch. 597), *In re Hutchinson and Tenant* (8 Ch. D. 540), *Curnick* v. *Tucker* (Law Rep. 17 Eq. 320), and *Le Marchant* v. *Le Marchant* (Law Rep. 18 Eq. 414), commented on. *In re* Adams and The Kensington Vestry 199

9. —— *Construction*—"*Sole and Unmarried.*"]

WILL—*continued.*

A testatrix, by her will made in 1860, bequeathed a fund to trustees, on trust to pay the income to her husband for his life, and on his death to divide the fund into four equal parts, and, as to one of the parts, "upon trust to pay the same to J. H., spinster, if she be then sole and unmarried, but, if she be then married," the testatrix directed her trustees to pay the income of the fourth part to J. H. for her life, for her separate use, and after her death to hold it on trust for her children. In June, 1878, the testatrix died, and her husband died in April, 1883. In April, 1861, J. H. married, and in November, 1878, a decree absolute was made for the dissolution of her marriage. There were three children of the marriage. J. H. did not marry again:—*Held*, that the words "then sole and unmarried" meant "not having a husband" at the time of the death of the tenant for life, and that, in the events which had happened, J. H. was absolutely entitled to the one-fourth share. *In re* Lesingham's Trusts - - - - - 703

10. —— *Construction—Turnpike Road Bonds—Real Security.*] Specific bequest of all moneys, stocks, funds, shares, and other securities, "except mortgages on real and leasehold security":—*Held*, that mortgages of turnpike road tolls, and mortgages of turnpike road tolls and toll-houses, were mortgages on real security, and came within the exception in the bequest. Cavendish *v.* Cavendish - - - - - 685

11. —— *Locke King's Acts and Amendment Act* (40 & 41 *Vict. c.* 34)—*Devise of Realty contracted to be purchased—Unpaid Purchase-money—Vendor's Lien—Rights of Devisees—Compromise—Rescission of Contract.*] A testator who had contracted to purchase real estate, and paid the deposit money, by will made in 1881, specifically devised such real estate to his daughter for life, with remainder to her children, without shewing any intention that the purchase-money should be paid out of his personal estate; and he died without having disposed of his personal estate, which was rather less in amount than the unpaid purchase-money, and without having completed the purchase or paid any further part of the purchase-money.—After his death an action by the vendor against the executor and trustee of the will for specific performance of the contract was compromised by the Defendant thereto, and the contract was put an end to upon the terms that the vendor should retain the deposit money and have his costs; and this compromise was confirmed by the Court by an order made by consent in an administration action in the presence of the tenant for life of the real estate and the trustee, all the remaindermen being infants.—Upon the further consideration of the administration action, the

WILL—*continued.*

devisees contended that they were entitled to so much of the personal estate as was equivalent to the unpaid purchase-money, upon the ground that the purchase was a conversion by the testator of his personal estate to that extent, and that Locke King's Acts had not altered the law in that respect:—*Held*, that there was a vendor's lien, and that Locke King's Acts Amendment Act applied; that accordingly all the devisees were entitled to was the real estate charged with the unpaid purchase-money, and therefore on the facts to nothing; but *held*, moreover, that the order of compromise would be fatal to their claim, if otherwise good. *In re* Cockcroft. Broadbent *v.* Groves - - - - - - 94

—— Power of leasing - - - 624
See Lease.

—— Separate use—Gift to husband and wife 222
See Husband and Wife. 2.

WINDING-UP - - - - - 259
See Company. 4.

—— Lien of solicitor of company on documents
See Solicitor. 3. [408

—— Petition—Order on—Appeal - - 488
See Practice. 2.

—— Petition—Payment of costs out of assets
See Company. 1. [611

WITHDRAWAL OF MEMBERS—Building society—Notice of withdrawal - - 421
See Building Society.

—— Mutual loan society—Notice of withdrawal
See Company. 5. [425, n.

WITNESS—Commission to examine - 522
See Practice. 8.

—— Costs—Cross-examination - - 606
See Practice. 4.

WORDS—"According to the stocks" - 664
See Will. 2.

—— "Provided the funds permit" - - 421
See Building Society.

—— "Real security" - - - 685
See Will. 10.

—— "Sole and unmarried" - - 703
See Will. 9.

—— "Used as trade-mark" - - 504
See Trade-mark. 2.

YEARLY RESTS—Administration of estate—Conversion - - - - 643
See Administration. 2.

YEARS OF DISCRETION—Infant—Access to mother - - - - 317
See Infant.

LONDON: PRINTED BY WILLIAM CLOWES AND SONS, LIMITED, STAMFORD STREET AND CHARING CROSS.

BIBL. LONDIN. UNIV.

UC - 2 MAR 1970